WORDS AND PHRASES [A,B]

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Subject: Words and Phrases

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Words and Phrases

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Abandoned Property

A property is an abandoned property when it falls within the definition of abandoned property as given in P.O. 16/1972—Any property not abandoned can not be taken illegally.

Abdul Hakim Vs. Secretary, Ministry of Public Works & Urban Development (1979)31 DLR 402.

Accountability—Co-sharer.

Liability to account from legal relationship of agent and principal and trustee and

cestui qui trust.— Responsibility to account not only for the amounts which have been actually received but also for that which with due diligence could be received does not rest on a co-sharer with no legal responsibility to undertake it.

Jagna Chandra Nandy Mazumdar Vs. Hemania Shashi Nandy Mazumdar (1956) 8 DLR 121.

Accounts slated and settled.

Where accounts are submitted and accepted as correct, whether in writing or by conduct, presumption arises that accounts have been accepted as correct; even though there was no strict accounting and the liability, therefore, ceases.

Jagna Chandra Nandy Mazumdar Vs. Hemanta Shashi Nandy Mazumdar (1956) 8 DLRJ21 (128 rK. h. cot)

Accretion to land—Accretion to the land of the riparian owner governed previously by the Alluvion and Diluvion Regulation (Bengal Reg. XI of 1825).

The right of accretion in respect of a property, which was a part of the public domain and to which a riparian owner had previously no right was a creature, originally, of usage and, subsequently, of positive law. This rule was given legislative shape for the first time in Alluvion and Diluvion Regulation (Bengal Reg. XI of 1825);

Abdul Mannan Vs. Kulada Ranjan (1979)31 DLR (AD) 198.

—"Accretion" —Accretion from the recess of the river—Accretion belongs to the person to whose estate it accretes.

River runs through the estate of the defendants—Bed of the river is the land of the defendant— After acquisition of the defendant's estate bed of the river became the defendant's private property and unless it is shown by the Government that bed of the river has been acquired by it, presumption is it remains the land of the landlord (defendants.)

Meser Gazi Vs. Abdul Gani Gazi (1968)20 DLR 415.

—"Acquisition"—Acquisition of citizens' land—Authority concerned to be careful in the matter of acquisition. The officers of the Government who are responsible for this type of work, namely acquisition of land for public purposes, must be sufficiently educated, alert and mindful in the performance of their duties, because their actions in such matters affect the rights of the citizens. The discrepancy in the two notices with regard to quantum of land sought to be acquired might lead to very serious consequences. It might have affected the whole building. We do not know what actions have been taken by the authorities concerned against the officers who committed such mistakes or what action they propose to take against the defaulting officers, but we cannot help observe that the administration should he more careful in dealing with the rights of the citizens in matters like this.

Begum Lufunnessa Ibrahim Vs. Prov. of East Pak. (1968) 20 DLR 174.

"Accrual of the right to sue" and "accrual of the cause of action."

The question is, is "accrual of the right to sue" synonymous with "accrual of cause of action" and does the right to sue accrue after one month of service of notice under section 109(1) of the Chittagong Port Act.

Ordinarily the right to sue accrues immediately upon the accrual of cause of action. Thus, in Ballentine's Law Dictionary (1948 edition) the legal meaning of "accrual of cause of action" is stated to be "the coming or springing into existence of a right to sue".

The Trustees of the Port of Chittagong Vs. SadharanB ima Corporation (1980)32 DLR 99.

Acquisition by the Government

In assessing compensation for acquisition of land under both the Land Acquisition Act, 1894 and the East Bengal (Emergency) Requisition of Property Act, 1948 it cannot be said any longer that compensation can be had for a bigger amount on a more liberal provision under the former Act than under the latter. The matters to be considered in determining compensation, matters to be neglected in determining compensation and the rate at which properties arc to be valued are the same in both the two Acts.

Md. Ismail & 0'S. Vs. Bangladesh (1982) 34 DLR 4.

—Government is the sole judge about the existence of urgency in taking possession of the land. If the question of urgency can be agitated, or, in other words, made justiciable in a Court of law, the very object of the Emergency Act will be frustrated. *Ibid.*

Acquisition for a Co-operative Society—can not be said to be an acquisition for public purpose—It is not an acquisition for the State or a private party.

Co-operative ownership is not State ownership nor is it a public enterprise. *Ibid.*

'Acquisition' and 'Requisition'.

The word acquisition of land should be held to cover 'requisition of land'. *Ajit Kumar Das Vs. Prov. of East Pakistan (1958) 10 DLR 69.*

Act and subsequent Amendment

When a reference is made to any enactment which has been amended by subsequent amendments, the reference to the original Act with its original number would mean the Act as it stands on a particular day with all the amendments.

Sui Gas Transmission Co. Vs. Islamic Republic of Pakistan (1959) 11 DLR (SC) 301.

Act of God

'Act of God' is a mere short way of expressing the proposition that a person is not liable for any accident as to which he can show that it is due to natural causes directly or exclusively without human intervention and that it could not have been prevented by any amount of foresight paid and care reasonably to he expected from him.

Abdul Rahman Abdul Gani Vs. United Oriental Steamship Co. (1959) 11 DLR 133.

Act (Legislative) and Rules—Conflict between the two.

Where changes in the rules have been effected by a non-legislative body under rule-making power the principle that rules or regulations cannot affect a provision of the Act is applicable even though it has to be considered as embodied in the Act and in case of conflict between a rule and provisions of the Act the latter prevails.

Mansur Ali Vs. Member Board of Revenue (1959) 11 DLR 412.

Ad-inconvenienti—Doctrine of—Applicability.

The greatest organs and agencies of the state have been consciously and unanimously holding a certain belief, and have been acting upon in numerous respects affecting the most fundamental rights of the entire people. It is beyond conception to tabulate all the vested rights and interests which have developed in consequence of this law. And there are many other laws which have produced extensive effects which cannot possibly be ascertained with exact mess. These circumstances should furnish an argument of almost insuperable character, in favour of upholding what has been the practice hitherto in regard to assent to constitutional laws.

Federation of Pakistan Vs. Tamijuddin Khan (1955) 7 DLR (FC) 291.

'**Added land**'

Where Government assesses revenue upon land as being 'added land' within the meaning of Alluvion and Diluvion Act and plaintiff claims exemption from an assessment on the ground that it was part of his permanently settled estate, the onus is on the plaintiff to show that the land forms part of his permanently settled estate.

Prov, of Bengal Vs. Jamila Khatun Chowdhurani (1952) 4 DLR 222.

"Adequate remedy" explained—Door of prerogative writ not closed unless the alternative remedy is equally inexpensive, expeditious and efficacious—Referring a party to file a lengthy suit when the same remedy can be had by invoking writ jurisdiction, not supportable.

Md. Abdul Karim Khan Vs. Commissioner Khulna Division (1964) 16 DLR (SC) 624.

Admiralty Jurisdiction of the High Court of East Bengal traced.

In 1890 the Admiralty Jurisdiction of the High Court of England was used to be exercised under the Admiralty Act of 1861 of the British Parliament which became the basis of the Admiralty jurisdiction of the High Court of Calcutta. The Admiralty rules framed by the High Court of Calcutta came into operation in June 1912.

Albert David (Bangladesh) Ltd. Vs. Messrs. Nediloyd Lijnen BV (1982) 34 DLR 356.

—Jurisdiction of the High Court Division derived from the Colonial Court of Admiralty Act of 1891 and the Courts of Admiralty Act of 1861 of England. *Ibid.*

—High Court Division is a Court of Admiralty.

Under the Act of 1891 the High Court Division of this Court was declared as the Court of Admiralty. This Court exercises the same jurisdiction as the High Court of England exercised in 1890 under the Admiralty Court Act of 1861. *Ibid.*

Admission : Admission to educational institution—Regulated by the express terms of the Prospectus of the Institution and the Government Instructions to the effect that, of the 2 States, each shall have one seat reserved for it in the institution for admission—No vested right accrues to one of the 2 States on the basis that for a long time in the past it has enjoyed the sole right of nominating both the seats for its own subjects.

Miss Nasim Banu Vs. Secy.. Ministry of home and Kashmir Affairs (1970) 22 DLR (WP) 321.

Adverse possession Co-sharers—What

constitutes adverse possession—Long undisturbed possession, payment of rents, enjoyment of profits and open dealings with the property indicate complete ouster of co-sharers.

Mokbul Ahmed, Contractor Vs. Md. Idris (1969) 21 DLR 511.

Adverse possession—Co-tenants- when the interest of a co-tenant is purchased by a third person, such purchaser becomes a tenant in common with the other co-tenants and the possession of such co-tenants cannot, in the absence of clear proof to the contrary, be adverse to such purchaser.

Sayed Abul Fazal Vs. Nirode Bala Deb Roy (1956) 8 DLR 181.

Advocates—Adverse remarks by the High Court Division touching their professional conduct—Expungement of The observations being extraneous to the merit of the appeals and having been directed solely against the professional conduct of the Advocates and the manner in which they had failed to discharge their obligations to their clients and to the Court cannot be kept on record as a part of the judgment and the observations in paragraphs 10-15 in entirety arc expunged.

Mohammad Golam Rabbani Vs. Govt. of Bangladesh (1979) 31 DLR (AD) 163.

Affidavit .: Verification of affidavit— where the petitioner is a public trust— Where a petitioner is a public trust, a wilt petition on behalf of the public trust, when verified by the estate officer of the trust who is conversant with the facts of the case is a substantial compliance with the provisions of rule 4 of Part I of the High Court Rules.

Kumudini Welfare Trust of Bengal Vs. Province of Ease Pak. (1961)13 DLR 693.

"Affidavit"—Filed by officers and prepared on the basis of records and not on personal knowledge—Cannot be relied on by a Court.

Mritunjoy Paul Vs. Province of East Pakistan (1962) 14 DLR 568.

—An affidavit sworn by a director of a company before one of the commissioners of the High Court at Calcutta who is not authorized to act as a commissioners for oaths and affidavits in regard to proceeding in the Dhaka High Court is receivable in evidence in the direction of Court for the purpose of proceedings in the High Court at Dhaka.

Where such an affidavit had been sworn before a commissioner of the Nigh Court at Calcutta a fresh court-fee stamp cannot be charged on the affidavit when the affidavit is sought to be used in the Dhaka High Court. *53 CWN (DR 1) 71.*

Agent

Decree as against the agent without the owner on whose behalf he acted—Can not be passed.

Albert David (Bangladesh) Ltd. Vs. M/S. Brosterm Shipping Co. Ltd. (1982) 34 DLR 363.

—Agent not bound to carry an order of his principal if it is against law.

Chairman BSM Corp. Vs. Masud (1978)30 DLR (AD) 169.

—Court of law must satisfy itself that command given to his agent by the principal is not against law—Court shall give opportunity to the person against whom an order is sought, to show cause that such an order, if passed, will be contrary to law. *Ibid.*

—Power of attorney agent—A power of attorney agent cannot be accorded all the rights and privileges which are enjoyed by the member of the legal profession.

Jogesh Ch. Mukherji (1953) 5 DLR 160.

—A recognized agent can make an appearance or an application or act on behalf of a party but cannot plead in a court. He can appoint a pleader but he has no right of audience. *Ibid.*

—Substituted agent.

Bank—It's responsibilities when acting on behalf of and on the instruction of a consignee of imported goods who is also its constituent in nominating and instructing a clearing agent.

—Clearing agent—Circumstances when someone engaged for clearance of goods by a bank for the benefit of an importer becomes the agent not of the bank, but of the importer.

Syed and Co. Vs. MM. Ispahani Ltd. (1958)10 DLR 552.

—"Agent", 'contract' and 'servant'—Distinction as between these three terms under the law.

M. Akbar Ali Vs. Mrs. Rezia Sultana Begum (1983) 35 DLR 391.

Agent and Principal

The general principle is that the act of the agent in the ordinary course of his business binds the principal—But the case will be otherwise if the right of one defendant is quite independent and separate from that of the other.

Seafarers Inc. Vs. Province of East Pakistan, (1968) 20 DLR (SC) 225.

"Against such party".

The phrase 'against such party' in the proviso to rule 11 of Order 22, C.P.Codc refers both to the respondent on whom service of notice has been dispensed with, and his legal representative. The phrase is comprehensive enough to govern any of the two contingencies, namely, the death of the respondent or the death of his legal representative.

Abu Basher Toha Vs. Sujayat All and ors. (1979) 31 DLR (AD) 326.

Aggrieved—Appeal

"Aggrieved person", meaning of.

There is no hard and fast meaning that could be ascribed to the term "aggrieved person". The meaning of the term "aggrieved person" is to be determined with reference to the facts and circumstances of each case.

Zamiruddin Ahmed Vs. Government of the People's Republic of BD. (1982)34 DLR 34.

Alien enemy

Even a Pakistani can become an alien enemy as defined in section 83 of the Code of Civil Procedure.

As the Proclamation of Emergency continues and the Defense of Pakistan Ordinance holds the field, any individual who is living in India, whether a Pakistan national or not, without any authority from the Government of Pakistan, is to be considered an "alien enemy".

Guru Das Saha Vs. Deputy Custodian (1968)20 DLR 683.

—Mere residence in enemy country does not make a person an alien enemy.

SA Latif Vs. JB Dubash (1970) 22 DLR (WP) 210.

"Amalnama" unregistered—An unregistered amalnama, though cannot be used as substantive evidence of the lease (for want of registration), can be taken as evidence of the plaintiffs' possession of the suit lands.

Meser Gazi Vs. Abdul Gani Gazi (1968)20 DLR 415.

Amendatory Statute.

If the amendatory statute is wholly void, the statute sought to be amended is not affected but remains in force. It is as inoperative as if it had never been enacted; or Act sought to be amended is at least, reinstated in its effectiveness upon the established invalidity of the amendment.

Ful Chand Das & ors. Vs. Mohammad Hammad & ors. (1982)34 DLR (AD) 362.

Amicus curiae

The power lies in a judge of the High Court to hear amicus curiae, where the judge thinks that he requires assistance in deciding a cause, where he is in doubt on point of law. *55 CWN (DR 3) 159.*

Annulment of intermediate tenure.

Annulment of intermediate tenure by purchaser of superior interest.

When the purchaser of a superior 1.2terest becomes entitled to an annual intermediate tenure, a demand of rent directly from an under tenant in the presence of the tenure-holders constitutes an effective election to annul the tenure.

Intention of the purchaser of a superior interest to annul the under-tenure and a certificate of possession in the rent suit terminates the tenure from the date of the institution of the Suit, It does not give any retrospective effect to the termination of the tenure from the date of sale.

Amulya Chandra Kendu Vs. Mohendra Nash Biswas. (1979) 31 DLR 75.

"Any person aggrieved".

The expression "any person aggrieved" in section 50 (Wakf Ordinance 1 of 1962) means any person who is interested to challenge the order made under this section.

S Masud Ali Vs. Md. Asmatullah (1979)31 DLR (AD) 250.

Apology offered accepted—The contemnor being an advocate of the Court.

An application was filed by the appellant tendering unqualified apology. In the application the appellant stated that he genuinely regretted the objectionable statement made by him and surrendered to the mercy of this Court.

In the circumstances slated above, though we find the appellant guilty of contemnor of Court in view of the fact that he is repentant and has tendered unconditional apology he is let off with a warning.

Abdus Sobhan Vs. Ayaz Bahadur Khan & ors. (1979)31 DLR (AD) 335.

Appeal—Right to appeal is conferred by statute—Such right can not be interfered.

Bangladesh Vs. Abdul Mannan (1977) 29 DLR (SC) 17.

—Right to appeal as well as of revision when can be claimed— In the absence of any provision for appeal the power of revision can be invoked in appropriate cases by way of application.

Bangladesh Vs. Abdul Mannan (1977) 29 DLR (SC) 17.

'Appeal will be dismissed' 'appeal will stand dismissed'.

There is a difference between the order 'the appeal will stand dismissed' and 'the appeal will be dismissed'. The former order contemplates a final order to be passed in future and therefore the case has not been finally disposed of.

Mohendra Ch. Dey Vs. Gobinda Prasad. (1953)3 DLR 313.

—Preferment of appeal unnecessary when the order to be appealed against is infructuous.

Kazi *Bahauddin Ahrned Vs. Province of East Pakistan (1963) 15 DLR 5.*

A continuation of the suit.

An appeal is said to be a continuation of a suit or is included within word 'suit'.

The legislature when it provides a hierarchy of tribunals for the determination of a dispute is really providing one complete procedure for such determination, proceedings before different tribunals being only steps in this procedure.

FA Khan Vs. Government of Pakistan (1964) 16 DLR (SC) 405.

Appellate Court.

Decision of the lower appellate Court when can be set aside in second appeal.

When the trial Court after considering the evidence and demeanor of the witness came to a finding which has been reversed by the lower appellate Court without giving due consideration on the proper aspect of the case such decision of the lower appellate Court is liable to be set aside in appeal.

Tanujur Rahman Vs. Md. Altafur Rahman (1969) 21 DLR 877.

—Objection as to manner of proof.

An Appellate Court scarcely entertains any objection as to the mode or manner of proof of and document or object.

Narendra Nath Pal Vs. Abdur Rahman Molla (1974) 26 DL.R 45.

Appellate Division and remand of a case.

Reluctant to remand a case to enable a party to fill up a lacuna.

The Appellate Division of the Supreme Court is reluctant to remand a case to allow a party, negligent in earlier proceeding in diligently bringing all evidence on record, indulgence to fill up the lacuna and in evidence.

Vice-Chairman Vs. Ghulam Nabi (1975) 27 DLR (SC) 156.

Appellate order.

Presupposes the existence of an original order— No original order, no appeal.

An appellate order is passed in appeal. An appeal presupposes existence of original order, when there is no original order the question of giving an appellate order does not arise. In law there can be second appeal if it is specifically provided as has been done in this case in article 11 and Article 11(2). The existence of original order is sine qua non of the proceedings. Since there is no original order in these proceedings all the subsequent appellate orders are without jurisdiction and no amount of consent of the parties would confer jurisdiction. This, is a well- settled principle of law. If any authority is needed reliance may be placed on the decision in

the case of Kiron Sing and others Vs. Chaman Paswan and others, AIR 1954 (SC) 340.

Monindra Nath Das Vs. Joint Secretary (1978)30 DLR 324.

'Apparent good order and condition'

Goods not properly packed arc not in 'good order and condition'.

Apparent good order and condition means that apparently, and so far as met the eye, and externally, the goods were placed in good order on board the ship.

Abdur Rahman Abdul Gani Vs. United Oriental Steamship Co. (1959) 11 DLR 133.

'Appertaining'—'Appurtenances'.

The primary sense of the word 'appertaining' is much the same as 'appurtenances'.

Fazlur Rahman Vs. Jogendra Mohan Das (1951)3 DLR 116.

Application of mind.

The order made by the Sessions Judge and Special Tribunal do not show any application of mind and the order indicates that he acted practically at the behest of the Public Prosecutor.

Habibur Rahman Vs. The State (1982) 34 DLR (AD) 55.

Apply

What the word 'apply' means and how to be understood.

In Webster's Dictionary 'apply' means, amongst others, to place in contact with a thing, to put to use, to devote to a particular purpose, to engage with a close attention. The different categories of meaning given in the dictionary to indicate in case of money that it is to be spent. It also means the money devoted to a particular purpose.

MA Hal Vs. TCB (1980) 32 DLR (AD) 48.

Approbation and reprobation

A party can not blow hot and cold in his stand before a court of law.

Nur Banu Vs. Noor Mohammad. (1983) 35 DLR (AD) 182.

Arbitration

A party to a dispute cannot be forced to go for arbitration in the absence of an agreement to that effect.

United Aircraft Vs. PIA (1977) 29 DLR 273.

Area of land

Area of land—conflict between sale certificate and the kabuliat—Circumstances when the latter shall prevail.

Ausaruddin Khondkar Vs. Abdul Kader Molla (1957)9 DLR 238.

—Area of land and share of land.

Document describes both the share as well as the area to be transferred. Which one to prevail when there is a difference between the two.

To go by the share mentioned in a document as the share sought to be transferred without taking the other parts of the document into account may result in forcing an intention upon the executants of the document which he did not possess. Taking the share alone as the guiding factor where there are in other places in the document a description of the extent of that share sought to be transferred would be unreasonable for, it may well be that the parties understood the share mentioned in the document to comprise only that particular quantity of land and not more.

Safiuddin Kazi Vs. Moslem Ali Howladar (1960) 12 DLR 266.

—Boundaries as well as area both are mentioned in the document—In case of difference between the two boundaries to prevail. *Ibid.*

—'Arrears of cess' and 'arrears of revenue' not interchangeable terms. Sale of estate held by Collector for arrears of cess is valid and the amount lying with the Collector on account of revenue could not be regarded as lying under the cess'. 'Arrears of cess' and 'arrears of revenue' arc not interchangeable terms.

Jogendra Kishor Pal Chowdhury Vs. Prov. of East Bengal (1957) 9 DLR 182.

Arrears of salary.

Declaratory decrees regarding claim to arrear of salary—Government not to avoid implementing decrees—Departments' practice of evading financial implications of decrees deprecated —Writ jurisdiction not to be made use of for enforcing declaratory decrees.

Govt of West Pakistan Vs. Fazl-e-Haq Musarrat (1960) 12 DLR (SC) 88.

—Not a contractual debt—Claim on bounty of Slate—Action at law for enforcement does not lie.

Claim of a public servant, for the payment of sakiry against the State, is not a contractual debt but a claim on the bounty of the State. No action at law lies for its enforcement. *Ibid.*

Articles of Association.

Articles of Association determine the scope of the functions of the director of a company—Persons dealing with the directors not bound to enquire into the specific resolutions.

P.K. Basak & Co. Vs. Gossen & Co. (1957) 9 DLR 1.

Articled clerk.

Two years' practice in the subordinate courts by a young lawyer just enrolled should more profitably be divided into two parts,—one year in the subordinate court and one year in the High Court Division.

Kazi Habibul Awal, Vs. Bangladesh Bar Council & ors. (1982) 34 DLR 333.

'As early as possible'.

The words 'as early as possible' cannot but mean 'as early as possible' within the terminus adqucm.

Al-Haz Abdur Rahman Bhuiya Vs. Commr. of Narayangonj Municipality (1958) 10 DLR 431.

Assignable claim.

The true test for determining the nature of the claim sought to be assigned should be to sec that the claim when it does accrue partakes of the character of a debt or a beneficial interest in movable property not, in the possession, either actual or constructive, of the claimant which can be recovered by an action.

Kazi Abdul Ali Vs. Nurul Amin (1955) 7 DLR 406.

Attestation to document.

Attestation to document is no evidence as to the recitals and contents thereof.

Basanta Kumar Vs. Santosh Kumar, (1972) 24 DLR 84.

Attestation of a document

Not a ground to fix the person attesting the document with the knowledge of the contents of the document. *(1957) PLR (WP) 311.*

Auction-purchaser's right to the land Purchased.

When an auction-purchaser has acquired a good title against a judgment-debtor he should not be compelled to part with it merely because he cannot hold his title against another.

Nirod Bala Vs. Monomohan Datta (1954) 6 DLR 559.

Audi alteram partem—Is to be read in every law.

Principle of *audi alteram partem* unless expressly excluded by law or by the nature of the objects of any particular law, is to be implied to have been provided in every statute.

Dr. Neelima Thrahim Vs. Gov. of Bangladesh (1980) 32 DLR 201.

Award and decree—Arbitrator's award and Civil Court's decree stand on the same footing.

An award made by an Arbitrator is a decree in all purposes and it can be enforced by a Civil Court, as if it was a decree of that Court. The award being a decree, the general principles applicable to execution of a decree will be available here.

Md. Emdadul Haque Vs. NV Co-op. M Society (1974) 26 DLR 120.

An award is altogether different from a recommendation.

It appears that the learned Labour Court misconceived the scope of section 34 of the Ordinance and confused between a claim and a right. It appears further that the learned Labour Court proceeded on a wrong assumption that the recommendation of the National Pay Commission is an award.

Manager, Azizuddin Industries Ltd. Vs. Abdus Satter (1979) 31 DLR 58.

B

Ballot paper.

Election Commissions jurisdiction to reject ballot papers with extra marks, when acquired.

Extra mark on the ballot paper must enter on the ballot paper before it is put into the ballot box; so that, on this positive finding by the Election Commission, the latter will acquire authority to reject the ballot paper from counting—Without such a finding, the Election Commission could not acquire such authority—This is the dictum of the Supreme Court.

Mohammad Abdur Rab Vs. Abdus Samad Sarkar, Chief Election Commissioner (1968) 20 DLR 675.

Bank—Its responsibility—Bank bound to make the payment on demand—It is not to arbitrate .in a dispute between two contending parties.

Pubali Bank Ltd. Vs. Bangladesh Agricultural Development Corporation. (1982) 34 DLR 104.

—Bank's claim, after LC opened— Bank's claim, after irrevocable letter of credit had been opened for its client for import of goods, to the payment of full amount due on such goods is fully enforceable, even though the client wanted the bank that to save his (client's) interest a new clause be inserted in the letter of credit but in spite of the bank's efforts to do so the letter of credit could not be amended as goods before the bank's intimation had already been shipped.

M/s. Mohammad Usman Brothers Vs. M/s. Muslim Commercial Bank Ltd. (1971)23 DLR 39

—Bank's function—Bank's liability to pay when the position created is one of debtor and depositor.

Released amount becomes a deposit and the bank becomes a debtor.

Sonali Bank, Vs. Abdul Mannan and ors. (1982) 34 DLR (AD) 21.

Bank and customer—Mutual open account.

When a person opens a current account with a bank and pays money into it, the bank is a debtor to the customer. If the bank .allows the customer to overdraw the account and he does so, he becomes a debtor to the bank and each party could say that he had a separate account against the other.

Reliance Bank Ltd. Vs. Profulla Kumar Banerje (1953) 5 DLR 69.

—Bank deposit.

Relation created between the depositor and the bank is one of debt.

Mahaluxmi Bank Ltd. Vs. Muhammad Saheb Meah (1957) 9 DLR 133.

'Bazars'.

Bazars with some structure on, which are held once in the morning every day, can be acquired under sec. 3(2) of the E. B. State Acquisition and Tenancy Act.

Yusuf Ali Chowdhury Vs. Prov of East Pakistan. (1959) 11 DLR (SC) 316.

'Bed of river'—Doctrine of reformation in situ.

When a river habitually covers up a land every year during the wet season and the land is not capable of cultivation in the usual way even when dry during the dry season, it is for all purposes the bed of river and it cannot be said that the river has yielded up and abandoned the land. The doctrine of reformation in Situ cannot be attached to such a soil.

Till the land rises beyond ordinary high water mark in such a way as to become fit for cultivation, it is part of the river bed and, as such, public property.

So long as a land remains part of the bed of a river, no private ownership can attach to it.

Rai Satyendra Kumar Das Bahadur Vs. Province of East Pakistan (1958)10 DLR 39=8 PLR (Dac) 495.

'Beel' having right of fishery, proprietorship of.

When the 'Beels' have ceased to be parts of rivers, the right of fishing in the 'beds' comes to be vested with the owners of the soil underneath.

Province of East Pakistan Vs. Tasiruddin Ahmed (1968) 20 DLR 434.

Benami

Benami—Transfer cannot be held benami where wills made for being absolved from a debt.

It has been contended that a transfer in consideration of debt is a valid transfer and the same cannot be held to be a benami transaction. It is true that under certain circumstances a valid transfer can be made in consideration of being absolved from a debt. But what is necessary is that the debt must be found to be due. In the case of Mina Kumari Vs. Bijoy Singh it was observed by their Lordships of the Judicial Committee as follows:—

'To the suggestion that the transaction was benami, a complete answer is furnished by the admission that the judgcment-dcbtor owed the plaintiff the amount stated to be the consideration for the sale- deeds and more."

Abdul Gafur Vs. Obaidul Hossain, (1968)20 DLR 1150.

Benami transaction—In a suit for declaration of title and restoration of possession, Court can decide if one of the defendants is a benamder for the other defendant regarding the suit land.

Sadequr Rahman Chowdhury Vs. Mvi. Abdul Ban, (1970) 22 DLR 858.

—Its history and characteristics.

In a bcnami transaction real owner of a property allows it to appear in the name of an ostensible owner, himself remaining the beneficiary of the property. The practice of bcnami developed in the Indian sub-continent long before its conquest by the Muslims and during the Muslim rule the practice of benami received full recognition

Muslims and during the Muslim rule the practice of benami received full recognition from the authorities and the Courts as well. That the practice of benami was widely practiced throughout the Sub-continent is evident from the early history of the East India Company.

Nurjahan Begum, wife of Mahmudur Rahman Vs. Mahmudur Rahman Mullick (1982) 34 DLR (AD) 61.

Benamidar and the real owner.

The ostensible owner or the benamidar holds the property in trust for the real owner. Relationship between benamidar and the real owner is that of a trustee and 'cestui que (rust'. Thus its cestul que trust became the beneficial owner of its property.

Nurjahan Begum, wife of Mahmudur Rahman Vs. Mahmudur Rahman Mullick (1982) 34 DLR (AD) 61.

—Benanii transfers may be classified in two classes of transactions.

Benami transfers may be classified in two classes of transactions. Transfers where the real owner of the property transferred to another without any intention whatever to benefit the transferee and no consideration passing from the transferor formed one class. In such transfers the transferor remains to be the real owner but he holds property in the name of the transferee. The other class consists of transfers where a person purchases property in the name of another person. In such transfers, there is a real transaction and the purchaser who pays the consideration money acquires the property for his own benefit, and the person whose name appears in the deed of transfer merely lends his name to the transaction, and acquires no interest in the property.

Nurjahan Begum, wife of Mahmudur Rahman Vs. Mahmudur Rahman Mullick (1982) 34 DLR (AD) 61.

Benami purchase—Possession of property.

Although the source of purchase money is an important criteria, but it is not conclusive where there are other circumstances showing that the purchaser intended property to belong to the person in whose favour the sale deed is executed. So it is the intention of the parties which practically determines the question as to who is the owner of the property.

Source of purchase money is only to be the criterion in the absence of all other relevant circumstances. Among other circumstances possession of the property has been held to be very important.

Nurjahan Begum, wife of Mahmudur Rahman Vs. Mahmudur Rahman Mullick (1982) 34 DLR (AD) 61.

—Benami transaction—Source of purchase money—Consideration of other relevant circumstances important—Motive for benami.

In a benami transaction source of purchase money an important criterion but it is not conclusive

conclusive.

Nurjahan Begum, wife of Mahmudur Rahman Vs. Mahmudur Rahman Mullick (1982) 34 DLR (AD) 61.

Bench and Bar—To work harmoniously

Both the Bench and the Bar are two arms of the same machinery and unless they work harmoniously justice cannot be properly administered. An erring judge and erring contemner are both a danger to the pristine purity of the seat of justice.

Moazzem Hossain Vs. State (1983)35 DLR (AD) 290.

Benefit of Tax-holiday

Profit of he company being entitled to the benefit of tax-holiday share-holders when receiving dividend are equally exempted from tax.

Commissioner of Income Tax Vs... Mr. Masuda Khatun (1982) 34 DLR (AD) 85.

Bias

Bias—When Judge is disqualified to sit on judgment in a case—Justice not only be done, but should also be shown to have been done

Where a Judge or a Member of a Tribunal has pecuniary interest however negligible in the subject- matter of the litigation which is pending adjudication before him, he is disqualified from hearing the matter without any further proof of bias in him from any quarters. But where the allegation of bias is based on kinship or relationship, it seems to us that the party alleging relationship between the contesting party and the Judge or a Member of the Tribunal, has to prove that there nature of relationship is such as to afford a reasonable bias for holding that there is a real likelihoods of bias. By this we do not mean to say that we approve of the conduct of a Judge or a Member of a Tribunal who appears to have some interest in the case due to his relationship with any of the contesting parties before him and yet hears the matter even though the parties have consented to his doing so. Justice should not only be done but it should appear to have been done so that people may have confidence in the administration of justice.

Mahbubul Huq Vs. Chief Commissioner of Pakistan (1968)20 DLR 883.

—Judge affected by bias when will render the decision void.

In a case where bias on the part of a presiding Judge is based on his pecuniary or proprietary interest in the subject-matter of the proceedings however small that interest may be, that will disqualify the Judge to sit over the proceedings and render his decision void but where such pecuniary or proprietary interest is not involved mere suspicion of bias even if it is not unreasonable is not sufficient to render the decision void.

Syed Akhlaque Hussain Vs. Pakistan, (1969) 21 DLR (SC) 152.

Court having already determined cx pars that the appellant had acted malafide in causing the retirement of the respondent, its subsequent suo mosa rule to show cause why the appellant should not pay Tk. 10,000/- to the respondent is an attempt to regularize its earlier ex-parte proceeding.

Habibullah Khan Vs. Shah Azharuddin Ahmed (1983)35 DLR (AD) 72.

—Court should avoid possibility of bias—A matter should not be heard by a Judge where likelihood of bias exists.

Moozzam Hossain Vs. Slate (1983) 35 DLR (AD) 290.

Bill of lading:

Bill of lading—Burden of proof about misstatement in it (e.g., where the complaint is that the goods had not been shipped) is on the buyer.

It is quite correct that although statement in the bill of lading is not a conclusive proof in law if buyer wanted to challenge the fact of shipment recorded in the bill of lading it was their duty to lead evidence in proof of their allegation that the goods had not been-shipped.

It was incumbent on the buyer to prove that the goods had not been shipped. Where this onus has not been discharged it is not possible to hold that the goods were not shipped or the bill of lading was a forged document.

Haji Moosa Haji Omar Vs. Ahmed Abdul Gani (1968)20 DLR (WP) 158.

—Master of the ship is liable in case of transhipment—not the person further endorsing the bill of lading in favour of a third party.

Even in cases where the hindrance of the ship's voyage is not caused by an excepted peril the ship- owner is only liable for delay or failure to deliver and to compensate for terms more onerous to the shipper in transshipment. But this only is the responsibility of the Master of the ship and not of the person who has further endorsed the bill of lading in favour of a third party. *Ibid.*

'Bill of lading' and 'Charter party'— The bill of lading is a document of title to the

goods and may as such be transferred to a third party who makes it subject to everything that appears thereon. it is therefore, both transferable and negotiable. Usually as between carrier and shipper, the contract is contained in the charter party and the bill of lading is not evidence of the contract but only a receipt for the goods and at the same time it is also a document which enables the shipper to transfer the goods to a consignee. Therefore, apart from the receipt, the bill of lading in such case is also a document of title.

Abu Bakr Siddique Vs. M. V. Aghia Thalassini (1978)30 DLR 94.

Black Listing.

Blacklisting—No authority can blacklist a person who is not a licensee under that authority.

The expression 'blacklisted' used by the Municipality concerning the petitioner really means nothing inasmuch as the petitioner's business has not been stopped or affected in any way by the expression "blacklisted". The petitioner is not a licensee under the Municipality and therefore, the Municipality has no authority to blacklist the petitioner.

M/S Anwar Asghar Brothers Vs. Chairman, Chittagong Municipality, Chittagong (1970) 22 DLR 201.

Board of Revenue

Board of Revenue abolished—Its function has been taken over by the Ministry of Land Revenue and Land Reform.

Md. Nehaluddin Vs. Govt. of Bangladesh (1977)29 DLR 91.

Boi Bikri

The word "Boi-bikri" used in the deed of will by the testator is confined to sale only and does not include a 'transfer' which is sale plus other mode of transfer such as lease, mortgage, etc.

"Boi Bikri" means sale and does not include any other transaction excepting sale.

Nirode Baran Paul Vs. Ahmed Meah (1970)22 DLR 529.

'Bonafide mistake'

Bonafide mistake when cannot be taken—Plea of. A plea of bonafide mistake not having been taken before the High Court Division cannot be entertained by the Appellate Division.

Amaresh Chandra Chakraborty Vs. Bangladesh (1979) 31 DLR (AD) 240.

'Bonafide requires'.

(Sec under section 17(c) EB Premises Rent Control Act. *Jagadish Sarkar Vs. Abdul Aziz. (1955) 7 DLR 314.*

Bond.

"All other perils, losses and misfortunes"

To be interpreted ejusdem generis.

General words like all other perils, losses and misfortunes etc. in the insurance policy

General words like all other perils, losses and misfortunes etc. in the insurance policy are to be interpreted ejusdem generis the particular words preceding them. It is manifest that the general words must be restricted to loss or damage caused to the goods by a cause which is akin to or resembling or of the same kind as the particular words preceding them.

ES. Insurance Vs. Rahman Trading (1976)28 DLR (SC) 109.

—Phrase "other perils and losses, etc." covers loss due to rough weather.

In the present case, the damage was due to the generation of heat by closure of the ventilators and that was done due to rough weather which brought sea-water on deck. This cause is covered by the words other peril and losses etc. in the policy in view of the fact the cause is akin to or resembling or of the same kind as the Loss particularized preceding the general words.

ES Insurance Vs. Rahinan Trading (1976) 28 DLR (SC) 109.

—Bond or negotiable instrument:The relevant text in the document ran as follows

"1, Mosiafizur Rahman,—hereby acknowledge the receipt of Rs. 10,000/- from Mr. Md. Azizur Rahman, having borrowed from him today, the 3rd day of January, 1963.

I promise to pay the said sum to the said Mr. Md. Azizur Rahman or his successors on demand."

It was contended that the above text shows that it is merely an acknowledgement of the receipt of a sum of Rs. 10,000/-.

Held: A bare reading of the document would show that it is not so. The petitioner has undertaken in express terms to pay the amount of Rs. 10,000/- to Mr. Azizur Rahman or his successors on demand.

In this document there is a recital of obligation of Mostafizur Rahman to pay the amount to Azizur Rahman or his successors. It, therefore, lacks in the essential quality of being negotiable.

Md. Azizur Rahman Vs. Mustafizur Rahman (l969) 21 DLR 119.

—"Boni judicis est ampliare jurisdictionem "—Judge's duty to enlarge his jurisdiction for advancement of substantial justice.

If a man has a right he must have a means to vindicate and maintain it and a remedy if he is injured in its excercise and enjoyment. It is pertinent in this connection to refer to another well-known legal maxim boni judicis est ampliare jurisdictionem which means that it is the duty of a judge to extend and enlarge his jurisdiction. This has been interpreted by the superior Courts of England to mean that it was the duty of the judge applying the law to amplify its remedies and without usurping jurisdiction to apply its rules to the advancement of substantial justice.

Kari Palan Mia Vs. State (1983) 35 DLR 118A

Bonus.

There is a distinction between 'share of profits' and 'commission' on the one hand and bonus on the other, the two first expressions relate to a legal right, the last refers generally to an ex gratia payment.

Md. Akbar Abdul Sattar Vs. WL Bogtstra (1956)8 DLR 19 (PC).

—Proportionate bonus to employees, working for a year.

Pakistan Petroleum Workers Federation Karachi Vs. Burmah Shell Oil Storage and Distributing of Pak Ltd. (1961)13 DLR (SC) 299.

Basis for assessing—In computing profit and loss for the purpose of awarding bonus the amount spent in payment of salaries, wages and other incidental expenses cannot be overlooked.

Where management did not make any profit in a particular year the workers were not entitled to get any bonus that year.

Saifee Development Corporation Ltd. Vs. Pakistan (1961)13 DLR (SC) 27.

—Bonus out of profit—by virtue of 1966 Finance Act, is now taxable. *(1982)34 DLR (AD) 85.*

—'Bonus share' is not exempt from income tax.

Super-Lax—Liability to pay the same—An additional duty of income tax.

Neither sub-section(1) nor 4 (A) of the Finance Act 1968 has given exemption to the bonus shares. On the contrary, section 4(B) expressly provides that nothing contained in sub-section (1) of section 4(A) shall be deemed to exempt the income representing the face value of any bonus or the amount of any bonus issued, paid or declared by a company.

In the present case tax has been levied on bonus shares and it being a super-tax is an additional duty of income tax and it is charged in respect of the total income of the previous year. Therefore, it is covered by clause (c) of item 43 because it deals with "taxes on income."

Pak Jute Mills Ltd. Vs. Income Tax Officer (1979) 31 DLR (AD) 178.

Boundary

Thana boundaries—Like the district boundary (mid-streams) of a big river are to be taken as the Line of demarcation in thana boundaries.

Abdul Hamid Howladar. Vs. Province of East Pakistan, (1972)24 DLR 142.

—Boundaries establish identity—Boundaries as well as area both are mentioned in the document—In case of difference between the two, boundaries to prevail.

There can possibly be no reason to hold that even the description of the land by boundaries was not sufficient to identify the land sought to be conveyed or was a false description of the land. The Privy Council has pointed out that where a land sought to bcconveyed is described by reference to its boundaries that makes the land sufficiently iclentifiable that prevails over the area said to be comprised therein.

Safiuddin Kazi Vs. Moslem Ali Howladar. (1960) 12 DLR 266.

"Brothels"—Control of profession by municipality.

Municipal bodies power to exclude the retention of brothels from certain specified area—Power to impose a total ban against the constitutional guarantee.

If by the prohibitory order, the profession is not to be practiced within the specified area but at some other place, the persons affected are entitled to some assistance in procuring places of residence for themselves, where they may live and Continue their profession, if they choose. Any attempt to squeeze out the profession or otherwise render it extinct may perhaps be found to be inconsistent with the provisions of the present Constitution, which allow the free practice of professions, subject to the power of regulation.

Mst. Sardaran Vs. Municipality, Lyallpur (1964) 16 DLR (SC) 372.

"Burden of Proof'

—Plaintiff must prove his own case and cannot rely on the evidence of the defendants to prove his case.

It is well settled that plaintiffs can succeed only on proof of his case and not on the weakness of the defense. In this case the learned subordinate Judge held that plaintiffs failed to prove exclusive possession. In view of this finding, it cannot be held from the evidence adduced on the side of the defendants that plaintiff's exclusive possession was proved.

Achi Meah Vs. Bacha Mean (1966)18 DLR 313.

Bureaucratic recalcitrance—along with the downright contradictory attitude as also its misleading statements in Court—Entailing hardship on citizens.

What has particularly shocked us is the manner in which innocent citizens were being harassed and driven from pillar to post.

Al-Haj Md. Mostafizur Rahman Vs. Deputy Commissioner, Chittagong (1982)34 DLR 328.

'By land'

The words 'by land' include the words 'by air'. *Fakir Muhammad Punjabi Vs. Federation*

The words 'by land' include the words 'by air'. *Fakir Muhammad Punjabi vs. Federation of Pakistan (1958)10 DLR (SC) 122.*

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WORDS AND PHRASES [C,D]

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Subject: Words and Phrase

Delivery Date: 1970-01-01

Words and Phrases

—"Cancel" and "discontinue"—Distinction between the two words,

The word "discontinue" means interruption of continuance, cessation or intermission. ft does not mean putting an end to something which but for the action in question would have gone on. The latter action amounts to cancellation. This is the distinction between the two words "cancel" and "discontinue" used in sub-section (3) of section 28 of Electricity Act (IX of 1910). The sanction in favour of the petitioner company was continued from time to time until the 30th of September, 1965. No further extension was granted and that amounts to discontinuance of the sanction.

Pabna Electric Supply Co. Vs. Province of East Pakistan (1968) 20 DLR 1158.

Capital expenditure

There is no definition of the expression capital expenditure which must be construed in a business sense save in so far as there may be rules of constructions applicable to it.

Mohan Lal Hargovinda Vs. Commissioner of Income Tax CP (1951)3DLR (PC) 121.

—'Capital expenditure' it has been said, is that which is spent 'once and for all'.

'It is an expenditure incurred with a view to bringing into existence an asset or advantage for the continuing benefit of the trade.

It is money employed 'for the purpose of acquiring the concern, not for the purpose of carrying on the concern.'

The land upon which a manufacturer carries on his business is part of his fixed capital. The machinery with which a manufacturer makes the articles that he sells is part of his fixed capital.

Commissioner of Income Tax, E Pak Vs. Luxmi Narayan Cotton Mills (1960) 12 DLR (SC) 135.

Care and protection—Difference between,

The difference between 'protection' and 'care' is that protection denotes preservation, whereas care denotes responsibility for welfare.

Fahimuddin Khonkar Vs. Mst. Zaibunnessa (1968) 20 DLR (WP) 297.

'Carriage of goods in a ship'—Towage of a dead ship.

Ruhul Islam, J.—Towage of a dead turbine ship by a ship-tug can be said to be "carriage of goods in a ship".

If the expression "carriage of goods in a ship" is given literal meaning, then, unless the cargo is placed on board the ship, there would not be any carriage of goods" as contemplated in the Carriage of Goods by Sea Act, 1925. In view of the nature of the contract which specifically mentioned about the bringing of the TSS 'PACIFIC ABETO by towing another ship (Tug) the carriage by towing could not be anything but "carriage of goods in a ship."

—No cause of action'—Conclusion arrived at from a mere reading of the plaint on its presentation—And the conclusion arrived at after going through the materials on record—Distinction between them.

Saleh Industries Vs. TSS Pacific Abeto (1983)35 DLR (AD) 1188.

"Censorship "

The word 'censorship' means excision, stop, regulation, control, etc.

The word 'censorship' means exclusion, stop, regulation, control, etc.

Dacca Picture Palace Ltd. Vs. Pakistan (1966) 18 DLR 443.

'Chala land' and nal land'

Chala lands arc comparatively elevated land fit for construction of residential structures, whereas nal lands are agricultural lands which are comparatively of low level.

Bangladesh Vs. Abdul Khaleque (1975) 27DLR 617.

'Char lands'

Char lands added by gradual accession of the river—The riparian owners of the land to which the char lands are added became the owner of the new char lands.

AS Aziz Mohammad Vs. Govt of Bangladesh (1979) 31 DLR (AD) 218.

'Chargeable'.

(Under Rule 5 of the Bengal Agricultural Income-tax Rules, 1944).

The word 'chargeable' merely means exposed in a cont1gcncy which may or may not occur.

Jagadish Ch. Mazumdar Vs. Commr, of Agricultural Income Tax, East Bengal (1956)8 DLR 327.

Charter party and bill of lading

—Consignee not fixed with the knowledge of the contents of charter party—Shipper has no means of knowing what may be in the charter party.

The bill of lading often contains the clause 'all other conditions as per charter'. Such a clause does not give the shipper notice of the whole contents of the charter party so as to make him liable to perform them.

Abu Bakr Siddique Vs. MV Aghia Talassini (1978) 30 DLR 94.

—Arbitration clause in the charter party—No cvidcntiary value as to this clause so far as the bill of lading is concerned. *Ibid.*

Christian Law

Minor—In the absence of father, mother is natural guardian.

It may be accepted that in the absence of the father, the Christian mother is the natural guardian of her minor children. It may also be accepted that it will not be unlawful for her to be the custodian of her ward's property.

Archana Prasad Nandi Vs. Miss Chilia Randolph (1980)32 DLR 118.

—Though a Christian mother as a natural guardian of her minor children can enter into an executor contract of sale in respect of her minor children's property, in decreeing specific performance thereof the Court will have to be satisfied, inter alia, that the contract has caused to the minor's benefit. *Ibid.*

CIF Contracts

The initials CIF stand for the words cost, insurance and freight. Thus if a merchant agrees to sell goods at 30s. per ton CIF. Manchester Docks, that sum will include the price of the goods, premium for insuring them and the freight payable for carrying them to their named destination.

Syed & Co Vs. MM Ispahani Ltd. (1958)10 DLR 552.

Civil rights

An invasion of civil rights of another is itself a legal wrong carrying with it liability to repair its necessary and natural consequences in so far as these are injurious to the person whose right is infringed, whether the motive permitting it be good, bad or indifferent. 1 *PLR 106.*

Circular

Circulars issued by the Government are for executive guidance and possess no legal force.

Administrator, Zilla Board Vs. Mukhlesur Rahman (1984) 36 DLR 71.

Citizen

Citizen—When a citizen can be declared an enemy—Circumstances explained.

In the present case Mr. Siddique Ullah who affirmed an affidavit to the effect that he has settled in India does not say as to when he left for India and started permanently residing there, or as to where in that country he is residing. On such allegations, it is not possible for a Court to hold that a citizen has become an enemy.

Shah Ghulam Nabi Vs. Vice Chairman, East Pakistan Enemy Property (1970) 22 DLR 48.

Clearing agent

Circumstances when someone engaged for clearance pf goods by a bank for the benefit of an importer become the agent not of the Bank but of the importer.

Syed and Co. Vs. MM Ispahani Ltd. (1958) 10 DLR 552.

Client.

A client may be understood in the sense of a constituent or customer or one who employs a lawyer or professional adviser and, as such, the possible relationship of a principal and agent cannot be excluded from the connotation of the word 'client'.

Syed and Co. Vs. MM Ispahani Ltd. (1958) 10 DLR 552.

Collector

The word "Collector" does not include the Sub- divisional Officer. Where the "Collector' is directed to do certain thing it cannot be transferred to the Sub-divisional Officer, he being not the Collector.

Khabiruddin Miah Vs. Darastullah Kazi (1969)21 DLR (BR) 27.

Commission.

There is a distinction between 'share of profits' and commission' on the one hand and bonus on the other. The first expression relates to a legal right, the last refers generally to cx gratia payment.

Md. Akbar Abdul Sattar Vs. WL Bogtstra (1956) 8 DLR (PC) 19.

"Committee'—Can be used even for an individual—Companies Act (VII of 1913), Table A, Sched. 1. Reg. 91.

The Pakistan Employees Cooperative housing Society Ltd. Karachi Vs. Ms:. Anwar Sultana (1969)21 PLD Karachi 475.

Common carrier.

At Common Law after the affreightment ends the common carrier incurs a new liability as an involuntary warehouseman of a bailee if the goods still continue to remain in his custody even by reason of some fault of the consignee and he is bound to take such care of the goods as a prudent man would take of his own goods of the same kind, bulk or value in similar circumstances.

Abdur Rahman Abdul Gani Vs. Mackinnon Mackenzie & Co. (1958) 10 DLR 213.

Company—Share-holder—Whether has any interest in "particular piece" of property in which company has an interest.

It is highly questionable whether any shareholder of a Company can claim to have an interest in any particular piece of property in which the Company has an interest unless the Company itself is brought into liquidation, and even then the interest is not of a direct nature.

Rai Bahadur Mohan Singh Vs. Rai Bahadur Jodha Mal Kuthalia (1961) 13 DLR (SC) 21.

Rai Bahadur Mohan Singh Vs. Rai Bahadur Jodha Mal Kuthalia (1961) 13 DLR (SC) 21.

—**Company in liquidation**.

Company in liquidation turns out to be solvent—Creditor's entitlement.

Where a company in liquidation turns out to be solvent, creditors whose debts carry interest by agreement or otherwise arc entitled out of the surplus assets to payment of interest accruing after time commencement of the liquidation until payment is made of the principal debts at the rate at which by agreement or otherwise interest on such debts is payable.

Chartered Bank Vs. Official Liquidator (1982) 34 DLR 324.

—Company matters—A meeting if called for appointing a Managing Director—Sufficient prior notice of that must be given to the other Directors.

Shamsul Huda Vs. Jalaluddin Ahmed. (1979) 31 DLR 5.

Compensation

The meaning of 'compensation' with respect to a property is the market value of the property.

Jibendra Kishore Acharya Chowdhury Vs. Prow, of East Pak. (1957) 9 DLR (SC) 21(23).

—Suit for compensation arising out of death caused by fatal accident—Appellate Court would not interfere only because it would have awarded different sum—Onus to prove that the amount awarded is excessive is very heavy.

Lim Joo Chiang Vs. Lim Siew Choo (1959)11 DLR 84 (PC).

—Partial damage of goods

It was contended on behalf of the defendant that when the plaintiff based his claim on the basis of total loss, constructive or actual, the plaintiff is not entitled to get any decree on the basis of partial loss.

Held: Plaintiff can be awarded a decree for partial loss even if he did not claim it in his plaint which was founded on the basis of total loss.

Even if no notice of abandonment is served, the insured's whole claim will not be defeated but he would be entitled to recover partial compensation in respect of the damaged goods.

BR Rakshit & Co. Vs. Federation of Pakistan (1959) 11 DLR 106.

—Ship owner's liability to pay damage for goods shipped where the bill of lading

contained the clause that the goods were shipped 'in apparent good order and condition'.

Abdul Rahman Abdul Gani Vs. United Oriental Steamship Co, (1959)11 DLR 133.

—Compulsory acquisition of land by the State—Law enacted by the legislature providing compensation for acquisition of land when such law is violative of the provisions of the Constitution in such matters must be held to be ultra wires.

Compensation of compulsory acquisition—The law ordinarily applicable in such acquisition is Land Acquisition Act (1 of 1884).

Province of West Pakistan Vs. M. Salim Ullah (1966)18 DLR (SC) 378.

Compromise when goes beyond the scope of a suit.

The proper procedure in a case where a compromise went beyond the scope of the suit was to incorporate the compromise in a schedule to the decree and make an order or a decree only in so far as those terms came within the scope of the suit and then that portion would be a perfectly valid and executable decree.

Nagendra Nath Mazumdar Vs. Kshitish Ch. Ghose (1957) 9 DLR 661

'Conditional or contingent'

The words 'conditional or contingent' mean that in case of debts or benefits accruing conditionally or contingently the immediate right to recover by an action does not arise until the condition has been fulfilled or the contingency has occurred.

Kazi Abdul Ali Vs. Nurul Amin (1955) 7 DLR 406.

Constitution—Its interpretation

K Hossain, CJ—Constitution should be interpreted as an organic instrument keeping its dynamic character in view. More specifically regard may be had to the political, social and economic conditions and their place in the historical setting and the present international milieu. The decisions of courts of other jurisdiction will serve as a helpful guide, but never an authority.

Mofizur Rahman Khan Vs. Govt. of Bangladesh (1982) 34 DLR (AD) 321.

Constitutional form of Government—Object of a government vis-à-vis right of citizens—Constitutional guarantee, safeguarding rights of citizens—Inviolability of the fundamental rights (Constitution of Bangladesh, Arts. 26 and 27).

Hamidul Huq Chowdhury & ors. Vs. Bangladesh represented by the Secretary Ministry of information (1982) 34 DLR 190.

Principle of exposition of one Act by language of another not applicable to instrument—In construing instrument intention of parties is the primary

instrument in construing instrument, intention of parties is the primary consideration.

Constitution of Document.

The principle of exposition of one Act by language of another cannot apply to the Instrument of Accession drawn up by a functionary of the Ministry of State and Frontier Regions. Indeed, the primary consideration in construing an instrument is to ascertain the intention of the parties to the instrument.

Fatoomal Vs. Rehabilitation Commissioner, Khairpur Division (1969) 21 DLR (SC) 291.

Contempt of Court—False and frivolous allegations made in written statement against a sitting Judge of the Supreme Court amounts to gross contempt and tends to interfere with administration of justice.

Abdus Sobhan Vs. Ayaz Bahadur Khan and ors. (1979) 31 DLR (AD) 335.

Contract

The word 'contracts' means written (and not oral) contracts only.

The word "contracts" in Part 1, Section B of the Conciliation Courts Ordinance has been used along with "receipts or other documents". There are authorities for the proposition that when two or more words which are susceptible of analogous meaning are coupled together noscitur a sociis, they arc understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general.

In our view the context in which the word "contracts" has been used in the aforesaid provision clearly indicates that written contracts are only meant.

Zamiruddin Vs. Havas Khan (1969) 21 DLR (SC) 39.

—Fraud or misrepresentation by which a contract is entered into renders it unenforceable in law and the party affected by it can repudiate it even if the original ground of repudiation is found to be untenable.

Karnaphuli Paper Mills Ltd. Vs. Amanullah (1971) 23 DLR 150.

—Contract with three persons for sale of a land—One person honoring the contract, the other two refusing—Enforcement of the contract on the ground that the contract is divisible.

Archana Proshad Nandi Vs. Miss Chilia Randolph (1982) 34 DLR (AD) 107.

—In such a position the Court will simply sever the contract and enforce it specifically so as to bind a party to the term of the contract. *Ibid.*

—Breach of contract—Compensation.

Irrigation Department being a component of the Government the latter is responsible for any loss caused to lessees of the Government on account of the Department's unauthorized action.

Mariam Vs. Bangladesh (1978)30 DLR (SC) 247.

—Frustration of contract, when can not be pleaded and when compensation for loss suffered to be paid. *Ibid.*

Implied condition in.

Implied condition in a contract can be excluded by an express stipulation to the contrary or by a statutory provision.

Pakistan through General Manager, *NWR Vs. M/S AB Issacs (1970) 22 DLR (SC) 371.*

Mercantile contract

Contract is mercantile transaction. Buyer purchasing goods from seller of another country undertaking through his bank to pay for the goods supplied through a bank in the seller's country. The contract to pay the seller is absolutely obligatory. No direction upon the bank to with-hold payment can be passed—Only exception is in case of fraud of which the bank has notice.

Uttara Bank Vs. Macmeill and Kilburn Ltd. (1981)33 DLR (AD) 298.

—The court will not interfere by granting an injunction from performing or discharging the contractual obligations. *Ibid.*

—Specific performance of contract—Suit for.

—Plaintiff must conform himself to terms of contract—Plaintiff, asking for relief not covered by terms of contract—

Held: not entitled to relief prayd for.

Haji Shaista Gui Vs. Haji Duranai (1969) 21 PLD (Prshawar) 185.

Contractual service

The appointments of the Chairman and the members of a Commission bear no resemblance to appointments to a civil service. These appointments arc ad hoc appointments, hiving all the characteristics of contract appointments bearing little resemblance to appointments to a civil service and may be governed for necessary purposes by the terms of a contract.

Prov. of West Pakistan Vs. Chowdhury Nazir Hossain (1960)12 DLR (SC) 140.

Contribution, suit for—Formal party, if liable.

Where a judgment-debtor brought a Suit for contribution from the other co-judgment-debtors in respect of joint decree for costs.

Held: Where a party is merely a formal defendant and not personally interested in the result of the suit he cannot be made liable to contribute. *1 PLR (Dac) 620.*

Conversion.

If a man takes the property of another without his consent by abuse of the process of law it is an act of conversion.

Ali Bepari Vs. Nowsher liu Bepari (1951) 3 DLR 87—I PLR 106.

Co-proprietor and co-sharer landlord

'Co-proprietor' and 'co-sharer landlord' are not interchangeable terms. A co-owner in a touji is not necessarily a co-sharer landlord in respect of every tenancy under it. To determine whether a co-proprietor is a co-sharer landlord, the test is whether the tenant is, or but for a special contract, would be, liable to pay him any part of the rent of the holding.

Sahasrangsu Kanta Achargya Vs. Rajab Ali Fakir (1954) 6 DLR 77.

Corroboration

The restaurant was purchased in June, 1936. The plaintiffs claim was that he had paid the purchase money and the defendant was engaged as his employee in the business on the terms that the defendant would be entitled to a share of the profit as remuneration for his services and that the term of the arrangement between the parties were oral. The defendant, on the other hand, contended that both he and the plaintiff were parties in the business. About the month of August, 1936 (2 months after the purchase of the restaurant and eight years before the plaintiff giving evidence in Court) the plaintiff set down in writing in a document (marked Ext. A) what he alleges to be terms of the arrangement and handed over this document to one E, a lawyer and a friend of the defendant. The document Ext. A was not signed but was admittedly written by the plaintiff himself.

Held: A document written in 1936 cannot corroborate evidence to be given by the writer eight years later. The fact that in 1944, when the parties were at arms' length, the plaintiff gave untrue evidence in the witness box does not afford an adequate reason for supposupporting in August 1936 when the parties were friendly and motive for misrepresentation was non-existent, he deliberately misrepresented an arrangement arrived at 2 months earlier.

Ext. A is a most important contemporary document which correctly stated the terms agreed between the parties.

Hubert James Vs. Gulam Hossain Paksuma (1949) 1 DLR (PC) 5.

Co-sharer—Co-sharer, what it means—A co sharer, whatever the extent of his right in the joint property, is a co-owner in every inch of that property to the extent of his share until partition takes place which he can claim as a matter of right.

Mardan Shah Vs. Shah Nasar Khan (1970) 22 DLR (SC) 149.

—Co-sharer's possession—A co-sharer's possession is a possession of all other co-sharers— Adverse possession by co-sharer can be claimed by assertion of hostile title—When exclusive title is claimed on the ground of ouster ad-valorem court-fee to be paid in respect of such share.

A co-sharer is Hot dispossessed only because he was kept out of possession as the possession of one co-sharer would be the possession for all.

Sashi Kumar Vs. Sreemati Kusum Kumari Debi (1982) 34 DLR 128.

—Co-sharer in tenancy and co-sharer tenant—The expression 'co-sharer in the tenancy' and 'co-sharer tenant of the holding' are not synonymous—'Co-sharer in the tenancy' includes 'co-sharer tenant". An unrecognized purchaser of a nontransferable holding is a 'co-sharer in the tenancy' but not a 'co-sharer tenant.'

Basharat Ullah Shaikh Vs. Faizuddin (1956) 8 DLR 367.

Co-tenant.

See under co-sharer' *Sayed Abul Fazal Vs. Nirodbala Deb Roy (1956) 8 DLR 181.*

Counsel's privilege—Its limits—Derogatory language against Judges of a Court of Record undermines confidence in justice.

S. M. Huq Vs. Honorable Judges of High Court, Lahore. (1953) 5 DLR (FC) 216.

Courts. Its meaning—There is no exhaustive definition of a Court in any statute. There are essential certain characteristics which invest a body with the character of a Court.

A Court is, according to Coke on Littleton, a place where justice is judicially administered and justice is understood, in the forensic world, to be a decision of a binding nature given on a point of dispute in a us between two or more contending parties, by applying the law of the land to the facts of the case, untrammeled by the subjective attitude of the decision-making body in exercise of the judicial power of the state and by following a judicial procedure.

It has, therefore, been sometimes observed that although it is extremely difficult to say what a Court is but ii is comparatively easy to say what a Court is not.

IDBP Vs. Master Industries (1974) 26 DLR 157.

—An authority, appointed under section 15 of the Payment of Wages Act, is not a court but a persona designata.

Golam Ahmad Vs. Muhammad Ata Karim (1957)9DLR 382.

—Tests for determining whether a tribunal is a court or not: (1) 'acting judicially' — Acting judicially in order to be a sign of acting s a court, must be acting as a part of the judicial machinery of the State, charged with the duty of determining the rights of one subject against another or questions of right between the subject and the State, and discharging its functions according to the established form of judicial procedure: and (2) When a tribunal acted in a manner similar to that of the court of justice, Its (i) constitution, (ii) functions, and (iii) procedure shall have to be looked into for determining whether it was a tribunal of judicial character. 8 *PLR (Dac) 1163.*

Court of Appeal— Change of law—Court of Appeal can take notice of law which has changed after institution of the suit.

Mohan Singh Vs. Tan Mia (1970) 22 DLR 593.

Court of facts and issues of facts.

The Court of fact must decide all the issues of fact which arise between the parties so that if the appellate Court takes a different view, the parties are saved from further harassment.

Rakhal Chandra Vs. Benode Haldar (1976)28 DLR 421.

Court—When becomes functus officio. A distinction is to be drawn between a case when the proceeding has terminated and one in which it has not terminated and the court still retains control over it. Whether the court still retains control over the proceeding or not must be determined upon the nature of the proceeding and the order passed therein.

Sheik Ayezuddin Vs. Priya Shankar Chowdhury (1954)6 DLR 595.

—Jurisdiction of a court over a decision made by an executive authority when the same is authorized by law—The court is not competent to investigate the grounds and reasonableness of such decision.

Ajit Kumar Das Vs. Province of East Pakistan (1959) 11 DLR 243.

—Court to protect legislative competency, as regards past action.

It is to be observed that endeavor of the Court will be to protect the legislative competency and the attempt of Parliament to validate past actions, so far as canon of judicial interpretation of legislative power under the Constitution permits.

Mafizur Rahman Khan Vs. Bangladesh (1982) 34 DLR (AD) 322.

—Court's solemn duty—to come to a conclusion that the will was not obtained by fraud or under influence.

Paresh Chandra Bhowmik Vs. Hiralal Nath (1984)36 DLR (AD) 156.

—Propounded must satisfy the court with convincing reasons where suspicious circumstances exist that the will was the genuine act of the testator.

Paresh Chandra Bhowmick Vs. Ihiralal Nath (1984)36 DLR (AD) 156.

Court—Subordinate Court in relation to an order passed by superior Court.

If any step is taken by any subordinate Court having ordinary normal jurisdiction in ignorance of any order of a superior Court. the subsequent orders passed by the subordinate Court are not ipso facto null and void, but they will stand unless they are either recalled or are set aside.

Rani Harshamukhi Vs. Maharaja Shashi Kanta (1955) 7 DLR 473 (495 r.h. cot.).

—Although an ex parte order of stay is a valid order, it does not ipso facto nullify all the proceedings of the Court of the first instance passed subsequently. If the Court comes to know of the orders of the superior Court, it should always act on the orders of the superior Court and the question is not a question of communication only but is one of knowledge of the Court and this knowledge may be direct or indirect. *Ibid.*

—As soon as a subordinate Court is satisfied of the existence of such an order of a superior Court, it must act on it. *Ibid.*

—Superior court's observation and the Lower Court.

Observations and findings (in an ad-interim injunction matter) by the appellate Court which do not arise for decision of the matter pending before it should not influence the trial Court when the same matter comes before it for final adjudication.

Modern Talkies Vs. Chowrangee Cinema (1976) 28 DLR 415.

—Some of the trappings of a court do not necessarily make a civil court.

Mahendra Nath Biswas Vs. Dulal Ratan (1959) 11 DLR 193.

—What is or is not a court—A body whose primary and only object is administrative, executive or arbitral cannot be converted into a court. Essential difference between

judicial power and arbitral power—Whether a tribunal is a court depends upon the substance—Incidents of a court.

Attorney-General of Australia Vs. The Queen (1958) 10 DLR 9 (PC).

—Court and Tribunal—Difference between them—Authority under the Police Officers (SP) Ordinance is tribunal.

There is a distinction between a Court and a tribunal. The Court has a clear and distinct connotation whereas a tribunal assumes wide range of character. It may be judicial tribunal, or it may be a domestic tribunal, and in between these are various ranges of adjudicating authority, which arc more often called administrative tribunals.

Bangladesh & ars. Vs. AKM Zahangir Hossain (1982) 34 DLR (AD) 174.

Court Martial

The Court Martial set up under the Army Act is at best a military tribunal and not a Court as contemplated under Article 109 of the Constitution.

Jamil Huq Vs. Bangladesh (1982) 34 DLR MD) 127.

—Court Martial are ad-hoc courts, are out of the ambit of Civil Courts.

The Court Martial is the creation of the Army Act and these are all ad-hoc Courts unlike the Courts as understood by the common parlance. *Ibid.*

—Court Martial if constituted legally, any jurisdictional error in procedure—Immune from writ jurisdiction.

If the Court is constituted legally and if the error in procedure has not affected the jurisdiction of the Court then the civil Court will not go into the question as to the sufficiency of evidence because those entirely arc beyond the realm of the writ jurisdiction. These are eminently within the jurisdiction of an appellate Court. *Ibid.*

Court fee

Pre-emption suit—Decision as to the amount of court-fee on plaint and question as regards jurisdiction of Court should be on merits and not on a prima facie basis with reference to price given in sale deed. *(1955) PLR (Lah) 1046.*

—'Cessante Ratione Legis Cessat Ipsa Lex'—Reason to prevail.

Reason is the soul of the law and when reason of any particular law ceases, so does the law itself (Cessante Ratione Legis Cessat Ipsa Lex).

Kari Palan Mia Vs. State (1983) 35 DLR 118 A.

'Cultivable land'

Cultivable land

The qualifying words 'cultivable' indicates that the land must be capable of cultivation without alteration or conversion. It cannot mean a conversion of land from one use to another. The word 'cultivable' clearly shows that the legislature never intended to include hat and bazar within clause(ii) of section 20(2)b) of East Bengal State Acquisition and Tenancy Act.

Yusuf Ali Chowdhury Vs. Province of East Pakistan (1957) 9 DLR 674.

Custody—Question of custody—loses its relevance when the girl concerned is found to be aged over 16 years—She neither being an accused or a witness in the case cannot be held in detention under courts order but is free to go to any place of her liking.

Ananda Mohan Vs. Stale. (1983) 35 DLR 315.

Customary Law—Form and applicability: Law of inheritance—Onus of proof—where a party sets up the pica of customary law in preference to personal law—onus is upon the party which sets up the plea.

Mst. Qaiser Khatoon Vs. Mvi. Abdul Huq (1973) 25 DLR (SC) 104.

—Onus of proof of the existence of customary law—Onus of proving existence of legal necessity for transfer of ancestral property in Gujjar tribe (NWFP) is on the person who supports transfer.

Sarfraz Vs. Md. Khan (1970) 22 DLR (SC) 34.

—Customary Law (Punjab).

Muslim Jats of Gurdaspur District (West Pakistan) are governed by Chundawand rule of succession—Widow in presence of sons of her husband by another wife entitled to half share of property as widow's customary estate terminable on her death or remarriage.

Mushtaq Ahmad Vs. Mst. Hakim Bibi (1969)21 DLR (SC) 375.

Customary right—Right of pasturage when can be claimed.

Customary right of pasturage presupposes that it must be in existence on the assertion of that right by the person enjoying the same as of right and not dependant on the consent or otherwise of anybody else.

A Court of Appeal can take notice of law which has changed after institution of the suit.

Mohan Singh Vs. Tan Mia (1970) 22 DLR 593.

—Custom—How ripens into a recognized right and obtains force of law—Burden of proof.

It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient; .but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. Ii will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.

Intaj Ali Vs. Yadulla. (1960) 12 DLR 573.

—A customary right can exist only in relation to the inhabitants of a district or a locality and it cannot be claimed in respect of the public at large. The custom if established, makes the local law of the district and it creates a right in each of the inhabitants irrespective of his interest in any particular property. If the law has to uphold it as a right, it should be immemorial in origin, certain and reasonable in nature and continuous in use.

Asia Khatun Vs. Sufia Banu. (1955) 7 DLR 71.

Customs officers.

Customs officers do not possess sufficient competency to be entrusted with the duty where the law requires careful consideration of questions of discharging burden of proof.

Collector of Customs Karachi Vs. Haji Usman Haji Ghani. (1959) II DLR (SC) 200 (220).

Customs Waters.

It means a 12-mile belt of the sea from the base line (of Bangladesh sea coast).

M. Samboom Asavhame Vs. Bangladesh (1979) 31 DLR 256.

'Dakhalkar'

In the current settlement, 1932 the dependants were recorded as dakhalkar, that person in possession.

It cannot be said that the settlement record does not recognize the tenancy, merely because the word dakhaikar has been used. The entry is to be read as a whole.

Braja Mohan Shaha Vs. Abu Syed (1953) 5 DLR 209.

Dakhilas

Dakhilas

Evidentiary value of dakhilas which are but private documents—Dakhilas in order to carry weight in a court of law has to be proved by the scribe who wrote them by the signature of the excitant and when such signatures are disputed by comparing disputed signatures.

Kalimuddin Sarder Vs. Assistant Custodian Enemy Property (1983) 35 DLR 129.

—Its evidentiary value about the question of possession.

Dakhilas cannot be held to be an evidence of hostile possession and ouster of a co-sharer. By mere payment of rent of land a co-sharer cannot exclude another co-sharer's title to it.

Dr. Jamiar Rahman Asia Bibi Vs. Tajuddin Sikder (1978) 30 DLR 259.

Damages

—Principle for assessment of damages—Place the party who has suffered in the same position as he would have been if he had not sustained the wrong—Assessment of replacement cost should be made on the date when the property was destroyed.

BIWT Corp. Vs. Hellenic Lines Ltd. (1976) 28 DLR 77.

Assessment of the amount of damages for injuries caused to the plaintiff.

The plaintiff suffered a severe injury on his right foot resulting in fractures of bones. This injury was responsible for disabling the plaintiff in regard to his movement for 5 or 6 months, and whatever physical deformity may have been complained of was due to this injury.

Abdul Awal Vs. Mofasiluddin (1975) 27 DLR 629.

—In a suit for damages for the alleged cutting away of the paddy, the main question is whether the plaintiff is in possession of the land and whether the plaintiff grew paddy.

Rakhal Chandra Vs. Benode Haldar (1976) 28 DLR 421.

"Damages" in case of inevitable accident—Cannot be claimed.

Defendant Vessel Taika Maru in order to avoid accident with a third vessel struck the plaintiff-vessel MV Gai and it was pleaded as an inevitable accident in defense.

Held: The accident was an inevitable accident and the accident Look place in spite of all the efforts of the Master and Sukhanies of the vessel Taika Maru and there was no negligence or absence of good seamanship on the pan of the crew of M V. Taika Maru and that the accident took place in

order to avert a more serious accident.

Owners of the Vessel M. V. Gazi Rahi,nani Industries Lid. Vs. Owners and Parties interested in the Vessel MV 'Taika Maru" (1968) 20 DLR 225.

Damages, suit for—A suit for damages for the use and occupation of land and mesne profit when maintainable.

Plaintiffs brought a suit for recovery of money by way of damages against the defendant on the allegation that they had cut away the paddy grown by the plaintiffs on their land.

Held: The plaintiffs having not filed a suit for declaration of title could have asked for compensation for the reaping away of paddy had they been able to prove their possession and growing of the paddy. Otherwise the plaintiffs in such a suit have to pay for declaration of their title to the land and its recovery from wrongful possession and must show that the suit was filed within the prescribed period of time. The plaintiffs in the instant case filed a money suit where their title was incidentally found by the Courts below. A suit for damages for the use and occupation of land and mesne profit when maintainable where the plaintiffs' title to the land and the wrongful use and occupation of it by the defendant are proved.

Haleman Bewa Vs. Gahar Ali Mondol (1980) 32 DLR (AD) 136.

—Damages for use and occupation— Title of the suit land found with the plaintiff—Defendant liable to pay damage.

If the defendant had chosen to grow paddy on somebody elses land, they have done so at their own risk and peril and must pay for it. The suit for compensation irrespective of the plaintiff's possession was maintainable at his instance when he has been able to prove his title in the Suit land.

Gaher Ali Mandal Vs. Manik Sikder (1975) 27 DLR 400.

"Day"—Commencement of day under the Bengalee calendar.

A day under the Bengalee calendar starts with the sunrise and continues up to sunrise of the following day whereas a day according to the English calendar commences on the expiry of 12 O'clock at mid-night and Continues up to the following 12 O'clock mid-night.

Surutannessa Bibi Vs. Debendra Nath Barman (1966) 18 DLR 490.

Dearness allowance—Principles on which it is given.

Dearness allowance is given to counteract the rise in prices when it is considered that the stage of revision of the basic wages is not reached, but if a revision takes place with reference to the prices up-to-date there is hardly any justification for the dearness allowance.

Even if it is assumed that while revising the basic wages, dearness allowance may also be given it must be on the ground that the basic wage is raised to meet true rise in prices partially and in order to meet the rest of the rise in prices dearness allowance is given.

Dalmia Cement Co. Vs. Dalmia Cement Factory Workers Union (1958) 10 DLR (SC) 157.

Death Register

Birth and Death Register—Proof of age.

Birth and Death Register maintained under Act IV of 1873 and the Register of births and deaths kept at the Police Station under the Village Choukidar Act (Act VI of 1870) arc public documents within the meaning of sections 74 and 35 of the Evidence Act. Entries in birth and death registers arc prima-facie proof of statements as to age contained Therein.

Abdul Rahman Vs. Upendra Narayan Majumdar. (1952) 4 DLR 237.

Decree

If the decree is one without jurisdiction—Whether pecuniary, territorial or in respect of the judgment-debtor—the executing Court can go into the question of excitability.

Hajee Md. Ahsanullah Vs. Arafatunessa Bibi (1981) 33 DLR (AD) 17.

—Fraudulent decree—A decree alleged to have been obtained by fraud cannot be set aside without express finding as to the effect that the decree was obtained by fraud.

Mofazzal Molla Vs. Parul Bala Debi (1972) 24 DLR 116.

—Decree when infructuous.

Court not to pass a decree which may be infructuous. No court should pass a decree which is infructuous and can be set at naught at the will of a person who has not been made a party to the Suit.

F was a necessary party to the suit but due to her absence on account of not impleading her as a party to the suit the entire Suit cannot fail. The plaintiffs can be no suited only in respect of the land in which F has possession and interest.

Fakir Chand Mia Vs. Qumaruzzaman (1974) 26 DLR 233.

—No Court should pass a decree which is infructuous. Person not made party to a Suit.

It is one of the established principles of judicial procedure that no court should pass a decree which is infructuous and can be sot at naught at the will of a person who has not been made a party to the suit.

Asadunnessa Vs. Qumaruzzaman (1974)26 DLR 363.

—Merger of: Trial Court's decree becomes merged in the decree of the appellate Court and consequently after the merger trial Court loses jurisdiction to amend the decree.

Sajeda Khatoon Vs. Mostafa Khatoon (1976) 28 DLR 221.

—Decree in a mortgage suit.

In a compromise decree in a mortgages suit where it was provided that on failure to pay single installment the whole amount outstanding would become due and recoverable by sale of mortgage properties and in case of deficiency by sale of mortgagor's other properties and also from the person of the mortgagor by executing the decree:

Held: The compromise decree went beyond final decree in directing sale of the properties of the mortgagor not included in the mortgage. But the decree itself could not be held to contain a personal decree as on the date of the compromise the court was not in a position to determine whether any balance would be legally recoverable after the sale. The decree amounted to more than a submission by the mortgagor to consent to a personal decree for the payment of the ultimate balance, if and when any such balances should be found to be due and legally recoverable.

Joy Chand Lal Babu Vs. Kamalaksha Chowdhury (1949) 1 DLR 46 (PC).

—'Preliminary decree'.

It is a completely erroneous view that the pre. liminary decree once passed cannot be amended.

Omed All Sikder Vs. Arman Sikder (1979)31 DLR (AD) 320.

—Decree, void and voidable—Distinction between.

The distinction between void and voidable decree is to be borne in mind. If the decree is voidable then unless it is avoided by a proper procedure, the decree stands, and is to be executed. In this regard wrong exercise of jurisdiction and absence of jurisdiction is to be noticed.

Hajee Md. Ahsanullah Vs. Arafatunnessa Bibi (1981) 33 DLR (AD) 17

Deemed to accrue or arise.

The expression "deemed to accrue or arise" cannot be extended to include income from a nonexistent source of income like irrecoverable loans advanced by the assessee to its customers.

Commissioner of Income Tax Vs. Lackatoorah Tea Co. (1979)31 DLR 396.

Declaratory suit.

—No consequential relief need be sought—Document being forged no consequential relief needed.

Faiz Ahmed Vs. KA Wahab (1984)36 DLR 357.

"Defamatory statement"—defined.

Defamatory statement is a statement which, if published, of and concerning a person, is calculated to lower him in the estimation of right-thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his Office, profession, calling, trade or business.

Khawaja Nooruddin Vs. Hamidul Huq Chowdhury (1963) 15 DLR 501.

—Double standard for ascertaining whether a statement is defamatory—according to the literacy and intelligence of the people concerned.

In a democracy where the mass is conscious of its power, sensitive about the violation of the trust in a person and is vigilant and anxious to enforce its power to bring the culprit to book and the person entrusted with power wants to live up to the expectation of the public or voters and eager to accept the verdict of the people and places his cards on the table for ascertaining the elements whether there has been any defamation, one standard should be used and in a society where the public is illiterate, unconscious of its power and does not know how to enforce its power to bring the betrayers to book the person entrusted being skilled takes recourse to all steps to hood-wink the public, another standard in ascertaining whether there has been any defamation should be used.

In our country most of the people are illiterate and unmindful of the events that happen in the Legislature or of the actions of their representatives. They are not conscious of their power nor do they criticize their representatives or take them to task. Only a handful of them is criticizing—the Press Ling one of them. In such circumstances, in our country, at the present moment, the Press should have more liberty and latitude than it has in other advanced Countries in criticizing the popular representatives and the Government in order to keep them within the bounds, it being the only influential body, at present, in our country. Though the Press may go a bit out of the way, it should not be hauled up for that excess. Human nature being as it is, a man, in power, unrestricted, is expected to go to excess under circumstances.

Khawaja Nooruddin is. Hamidul Huq Chowdhury (1 963)15 DLR 501.

—Presumption of law as to falsity and ma lice—Presumption rebuttable. *Ibid.*

—Damage claimed for defamatory statement— burden that is on the plaintiff. *Ibid.*

—Comment otherwise fair even though deviates slightly from accuracy not within the mischief of law. *Ibid.*

Default order.

—(such as "the case shall stand dismissed', etc.) when made, different considerations arise— Crucial test is to find the real purport of die order— When after passing an order a court becomes *functus officio* and when not. Whether an order is a self-executory default order or a conditional order—the court is the best authority to judge.

Hajee Md. Ahsanullah Vs. Arafatunnessa Bibi (1981) 33 DLR (AD) 17

—Apart from this even, if default has taken place by virtue of self-executory order, the Court can review its own order as provided in CP Code. Thus whether the order is final in the sense that with the passing of it the court as far as the question of extension of time is concerned becomes functus officio or whether it is just a conditional order—"the court passing the conditional order is the best authority to judge"—Over and above the court can review its own order under the provisions of CP Code and extend deposit time on the authority of reviewing its own order. *Ibid.*

—When part of costs ordered to be deposited out of time does not amount to default.

Tajendra Dhar Vs. Rohini Ranjan Saha (1971) 23 DLR 45.

Delay causing loss

Circumstances which caused further delay in getting the goods to be taken into account while assessing the loss.

Al-Sayer Navigation Co. Vs. Delta International Traders Ltd. (1982) 34 DLR (AD) 111.

"Delegated legislation"

—Instructions issued under the Act do not bear the character of delegated legislation.

The instructions which the Central Government issue under Act III of 1956 are not of the nature of delegated legislation at all, for, the. legislature itself having determined that claims were to be filed in respect of the properties left in India by displaced persons, the instructions merely provided as to whom from amongst that class should be treated as entitled to lodge such a claim.

Syed Abdur Rashid Vs. Pakistan (1962)14 DLR (SC) 41.

"Delegation of legislative power"

Bestowal of large discretion to executive authority by the legislature under the Arms Act does not amount to delegation of legislative authority.

District Magistrate, Lahore Vs. Syed Raza Kazim (1961) 13 DLR (SC) 66.

"Delegation"—Judicial or quasi-judicial administration bodies and Courts can delegate their functions.

Mian Muhammad Sarif Vs. Member, Election Commission, Lahore (1968) 20 DLR (WP)

—"Delegation" of functions by Election Commission and Chief Election Commissioner permissible. *Ibid.*

Delivery of possession.

Certified copy of the writ of delivery of possession supported by the evidence of the decree holder himself and one of the mukabila witnesses is sufficient to establish that delivery of possession was given to the decree holder.

Rakhal Chandra Das Vs. Benccha Khatun (1972) 24 DLR 63.

—Symbolical delivery of possession, in the eye of law, has the effect of actual possession so far as judgment-debtors are concerned. *Ibid.*

—Symbolical delivery of possession would operate as against the judgment-debtor but will be of no avail against a person who was not a party to the proceeding.

With regard to sale by Court, the position is that, as against the judgment-debtor, symbolical possession obtained by the purchaser would amount to dispossession of the judgment-debtor.

But with regard to a person who is not party to the suit, physical possession, that is, actual possession, must be established.

Afajuddin Vs. Munshi Sona Meah (1965) 17 DLR 313.

—Delivery of possession—Symbolical

X, the owner of the property transferred the suit-lands to Y. Subsequent to the transfer the property was sold in certificate proceedings in which X was a party and not Y, and thereafter symbolical possession was taken against X. Held: Y's interest not affected by the sale.

The position resolves itself thus: X, the original owner of the suit lands, transferred them to plaintiffs. Subsequent to such transference, there was a default in payment of public dues in respect of the suit lands which were put to certificate-sale where in X was made a party but not the plaintiffs. A delivery of mere symbolical possession of the suit-lands to the purchaser of the certificate-sale will not amount to dispossession of plaintiffs, who were not parties to the certificate-proceedings. Therefore, as against plaintiffs, the only kind of dispossession by the certificate purchaser must be actual physical dispossession.

Afajuddin Vs. Munshi Sona Meah (1965) 17 DLR 313.

—Delivery of possession, Order of—when withdrawn

—Delivery of possession, Order of— when withdrawn

Until and unless the order' of the executing Court recalling the writ of delivery of possession is communicated to the peon charged with the execution of the writ of delivery of possession, the delivery of possession given by him cannot be characterised as ultra vires.

Mozibur Rahman Vs. Jamini Moshu (1955) 7 DLR 82.

Departmental Enquiry

Departmental enquiry about the conduct of one of its employees—cannot be interfered with by a court of law, as long as such enquiry is held in accordance with procedure laid down and does not violate the principle of natural justice.

Chittagong Port Authority Vs. Sujjat Ali (1984) 36 DLR 181.

—A suit in a court of law against a departmental enquiry—Court will follow the same principle of non-interferences long as the departmental rules are observed and principle of natural justice is followed. *Ibid.*

Depreciation fund

A depreciation fund is an absolute necessity in relation to any modern industry and is maintained with a view to provide for replacement of machinery, and this need not be only due to wear and tear over a long period of time; there may be an accident, or certain machinery may suffer from major defects and require replacement for the purpose of proper operation of the company. An accident may occur, such as an earthquake, and for such cases it is necessary that there should be provision available to the company to make good the damage out of its own resources.

A 5 per cent rate of deduction out of the total profits of a company on account of the depreciation fund is one which is in accordance with industrial practice, and is allowed for purposes of assessment of income tax as well.

Zeal Pak. Cement Factory Vs. Cement Labour Association (1960) 12 DLR (SC)1.

Deputation posts.

Officers of a Province holding a post on deputation to the Centre cannot validly object if he is reverted to his old post in the Province, cannot set up the plea that his post on deputation was higher in rank, because he does not acquire any right in himself to hold such a post. A reduction from a deputation post is not a reduction in rank.

Pakistan Vs. Fazlur Rahman Khundkar (1959)11 DLR (SC) 253.

"Determine" —The word shows that the Government cannot act arbitrarily.

The word "determine" in section 4 of the Act shows that the Central Government cannot act arbitrarily and without a factual basis, and the legislature has laid down sufficient norms and standard for the purpose of determination of such rate.

Adamjee Jute Mills Vs. Controller of Imports (1968) 20 DLR 791

Deviation of ship.

—Ship's owner held responsible for unauthorized deviation of the ship which carried the concerned goods.

In the instant case, the ship instead of proceeding from a North Yemen port to Bangladesh proceeded to the opposite direction to Dar-es-Salam. It was in violation of the bill of lading. There is no doubt that this deviation was unauthorized. The ship owners, therefore, must be held responsible for this unjustified deviation and this deviation is one of the causes of delay.

Al-Sayer Navigation Co. Vs. Delta International Traders Ltd. (1982) 34 DLR (AD) 111

Discharge and dismissal

The term 'discharge' as defined under clause (I) of section 2 of the Standing Orders, 1965 means "the termination of services of a worker by the employer for reasons of physical or mental incapacity or continued ill-health of the worker or such other similar reasons not amounting to misconduct and the term 'dismissal' as defined under clause (g) of section 2 of the said Standing Orders means the termination of service of a worker by the employer for misconduct.

Aminul Islam Vs. James Finlay (1974) 26 DLR (SC) 33.

Discharged

A "discharged" employee entitled to the benefit of section 11 of the Act.

If the employer discharges an employee even on grounds of physical incapacity that too, would amount to a discharge" which will entitle the employee to the benefits contemplated by section 11 of East Bengal Act I of 1952.

A Sukur Vs. Chairman, 1st Labour Court (1968)20 DLR 520.

"Disciplined force"

—Army, navy and air force is part of the disciplined force.

In the Constitution, for the first time, a new conception has been introduced, that of 'disciplined force', in the services of Bangladesh.

Jamil Huq Vs. Bangladesh (1982) 34 DLR (AD) 126.

'Discrepant statement' and 'contradictory statement'

A discrepant statement is not fatal to the credibility of a witness. A contradictory statement is one which is conflicting and is not reconcilable with other statement

either of his own or any other witness. The question in such case is that, it is open to a court of fact either to reject the whole evidence of a witness as untrustworthy or to reject the contradictory part as unreliable or to rely upon that portion, which, in the opinion of the court, fits in with other evidence and die facts and circumstances of the case. The exercise of the power is guided by judicial discretion, and cannot be exercised either arbitrarily or capriciously.

Moyezuddin Vs. State (1979) 31 DLR (AD) 37.

Dismissal

—Dismissal order passed by an authority was set aside by another competent authority—The next superior authority cannot uphold the original order of dismissal as the dismissal order was in existence having been set aside in the meanwhile— A Sub-Inspector of Police was dismissed by the

Superintendent of Police on a charge of corruption and misconduct. On an appeal by the aggrieved party, the Deputy Inspector-General set aside the order of dismissal and remanded the proceeding for a fresh enquiry. On remand the S. P. again passed an order of dismissal. Thereupon an appeal was again preferred before the DIG who again set aside the order of dismissal and directed a de novo enquiry. Thereafter the matter was taken to the Inspector-General of Police, who by his order dated 18-3-55 upheld the order of the S.P., by whom the order of dismissal, was originally passed.

Held: On 18-3-55, when the IGP passed the order upholding the order of dismissal passed by the SP, the dismissal order did not subsist and was of no legal effect at that time, inasmuch as it had been set aside by the order of the DIG and as such the order of IGP was misconceived.

ASM Shamsul Alam Chowdhury Vs. Province of E Pak. (1962) 14 DLR 553.

—"Dismissal for default' and not a Judgment—Party may be heard.

Mozahar Sikder Vs. Farid uddin Ahmed (1983) 35 DLR 235.

—Dismissal for non-appearance

Counsel present in Court when the case was called on for hearing—Prayers for an adjournment being refused counsel left the Court for fetching his brief but he found the case on return to have been dismissed for default and the prayer (orally as well by petition) to have the case restored rejected:

Held: In refusing the prayer for restoration, the Court acted with undue severity and the Supreme Court made an order restoring the case for hearing according to law.

Ali Akbar Vs. Khatun Nessa. (1959) 11 DLR (SC) 367.

Dissolution of partnership—Company affairs

Confidence between the two share-holders completely shook—Dissolution

appropriate.

Rahimuddin Ahmed Vs. Bengal Water Ways Ltd. (1979) 31 DLR 82.

Dividend—What it means

Dividend means the sum of money set aside out of profits of a company for distribution amongst the share-holders.

Commr. of Income Tax Vs. Mrs. Masuda Khatun (1982)34 DLR (AD) 85.

Division Bench

Division Bench (of the High Court) when on a point of law takes a different view from another Division Bench—Procedure it should follow— Where a Division Bench of the High Court is

inclined to take a different view from that in an earlier judgment of a similar Division Bench, one course open to the Court was to "have expressed their doubts regarding the view taken in the precedent case in a Court of co-equal jurisdiction, while yet following that view, and left the matter to be raised in appeal before this Court. The alternative course, under the Rules of die Court, was to refer the matter to a larger Bench.

Province of East Pak. Vs. Serajul Huq Patwari (1967)19 DLR (SC) 281.

Doctrine of Eclipse

The doctrine of eclipse can be made applicable, although the term does not appear to be self- explanatory only to a pre-constitutional law which is otherwise a good law but, of which, on the enforcement of fundamental rights, life-breath has been taken out. It remains in a state of suspended animation and on the removal of the spell, as it were, it springs back into life, of its own motion without any further legislative effort. If the theory of subject- wise distribution of legislative powers as the only basis of legislative incompetence is accepted, then there can hardly be any case of a law being void ab initio under a unitary constitution.

Reference to the decisions under the American Constitution for the purpose of interpreting the provisions of the Constitution in another country cannot always be useful because of the fact that the Constitutions of the two countries arc drafted entirely in different languages. In the Constitution of the United States there is no such provision as contained in Article 4 of the 1956 Constitution of Pakistan or Article 6 of 1962 Constitution of Pakistan which arc almost in the same terms as Article 13 of the Indian Constitution.

Abdul Majid Bepari Vs. Kashem Ali (1975) 27 DLR 1.

Doctrine of Election

What it means. The doctrine of election is based on the principle that the election must be voluntary and not one under duress or compulsion.

Modern Talkies Vs. Chowrangee Cinema (1976) 28 DLR 415.

Doctrine of "indoor management"

Its meaning. The doctrine of "indoor management' is to the effect that persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to enquire whether acts of internal management have been regularly done.

In the present case the lessee entered into an agreement of lease on the terms sealed by the Secretary of the Society. It was subsequently contended on behalf of the society that the Secretary was not authorized by the Managing Committee to enter into any contract and as such, the lease was not a valid lease.

Held: As the Secretary was entitled under the by-laws of the Society to enter into contract on behalf of the Society the lessee was not required to enquire whether the Society actually authorized the Secretary to enter upon the contract. Such transaction with the Society is saved by the doctrine of "indoor management'.

Pak. Employees Co-operative housing Society Ltd. Vs. Anwar Sultan (1969)21 DLR (14'?) 345.

Document

The contention was that the document was incorrectly read and interpreted by High Court—But the document not printed or placed on record in appeal in Supreme Court —Objection rejected.

Divisibility of transaction of sale—No presumption on basis of recital in the deed that vendees took the property in specified shares, if consideration was mentioned as a lump sum.

Abdullah Vs. Abdul Karim (1968) 20 DLR (SC) 204.

—Two documents relating same transaction.

When a transaction is made by more than one document, then both the documents should be read together and the cumulative effect should be taken into consideration.

Dr. Habibur Rahman Vs. Md. Mansur (1973) 25 DLR 211.

—Documents disputed, admissibility of—in a writ proceeding before the High Court.

Disputed documents cannot be accepted in evidence without strict proof thereof which is not possible in summary writ proceedings, the proper forum for proving such documents is the Civil Court.

In writ petitions parties are permitted to adduce evidence by affidavit but that does not mean that the documents annexed with the affidavit by the parties become ipso

facto admissible irrespective of the rule of proof as laid down in the Evidence Act.

Anwar Hossain Dewan Vs. Deputy Custodian Enemy Properties (1969) 21 DLR 938.

—Attestation of document—Attestation of document—is no evidence as to the recital or contents thereof.

Basanta Kumar Basak Vs. Santosh Kumar Basak (1972)24 DLR 84.

Document—Construction of—Principle of exposition of one Act by language of another not applicable to instrument—In construing instrument, intention of parties is die primary consideration.

The principle of exposition of one Act by language of another cannot apply to the Instrument of Accession drawn up by a functionary of the Ministry of State and Frontier Regions. Indeed, the primary consideration is construing an instrument is to ascertain the intention of the parties to the instrument. CPSLA No. K 142 of 1968.

Fatoomal Vs. Rehabilitation Commissioner, Khairpur Division (1969) 21 DLR (SC) 291.

Photostat copies in the Court not entertainable.

In this case instead of giving original copies of the document or authenticated copies thereof as required under the rules, Photostat copies of the documents have been appended which are in violation of the rules, and arc also not readable without the aid of magnifying glass.

Secretary of the Govt. of East Pakistan Vs. Manik Chand Sardar (1968) 20 DLR 908.

—One document executed by several vendors owning different lands—not irregular.

Execution of a common document by several vendors is not irregular, if the lands sought to be transferred have been specifically described in the sale-deed.

Ful Chand Das Vs. Mohammad Hammad (1982) 34 DLR (AD) 364.

—Execution and registration of— Sufficient to pass title.

Consideration may be a cash consideration or a promise to pay. In either case, title will pass with the execution and registration of the deed. In case of promise to pay consideration, the vendor may have a lien on the properties sold till considerations arc paid but title will pass with the execution and registration of the deed.

Sardar Menhazuddjn Ahmed Vs. Sudhir Kumar Sinha (1958) 10 DLR 621—8 PLR (Dacca) 454.

—Execution and registration not sufficient proof of voluntary execution.

Mere registration cannot be regarded as affording sufficient proof of the voluntary execution of the will much less of us being executed while of sound disposing mind. Where there are circumstance of suspicion, it is the duty of the Courts to accept such evidence with great caution.

Per Mohammad Munir, CJ,—Proof of registration proceedings raises the presumption that these proceedings were regular and honestly carried out, and the evidence of due registration is itself some evidence of execution against the person against whom the document is sought to be proved.

Fate Mohammad Vs. Mst. Niamat (1955) 7 DLR (FC) 165.

—**Thumb impression.**

Genuineness of executants thumb impression does not exonerate him from proving his knowledge of the document's content.

Thumb impression of the executants of a document was found to be genuine by the Finger Print Expert but that alone cannot exonerate the defendant from proving that the said executants executed the Kabala knowing fully the contents thereof.

Tamijur Rahman Vs. Md. Altafur Rahman (1969) 21 DLR 977:

—Document of transfer of immovable property by a foreigner.

Kabala executed and registered in Bangladesh in 1975—Presumption is the executants was citizen of Bangladesh as no Indian national could transfer any property in Bangladesh (in 1975) by registration.

A kaixila executed and registered in Bangladesh in 1975 created a presumption that the registration authority was satisfied that the execuinni was a valid citizen and national of Bangladesh since an Indian national as such could not transfer any property in Bangladesh by way of any registered deed.

The authority in the Government could not question and annual the validity of such title by an executive order. If the Government wanted to claim the title in such property it could only do so by way of an appropriate suit for declaration of title and cancellation of the registered kabala as such.

Sultanuddin Chowdhury Vs. Bangladesh (1980) 32 DLR 252.

Domestic Enquiry

Domestic Enquiry is not governed by any statutory rules—Principles of natural justice (where do incstic enquiry is held) require that allegation against a person should be brought to his notice and he be given an opportunity to submit his defense.

MA Hai Vs. Trading Corporation of Bangladesh (1979)31 DLR 326.

Domestic tribunal

Order passed by a domestic tribunal to what extent subject to scrutiny—A domestic

Order passed by a domestic tribunal to what extent subject to scrutiny—A domestic tribunal not bound by the provisions of Evidence Act.

Bikash Ranjan Vs. Chairman, 2nd Labour Court (1977) 29 DLR (SC) 280.

Domicile of Origin

Loss of domicile of origin how to be established. To every adult person the law assigns a domicile which is called the domicile of origin and which remains attached to him until new and different domicile takes its place.

There is absolutely nothing on the record to show that the accused respondent ever became an Indian citizen in substitution of his domicile of origin. Therefore, the domicile of origin remains attached to him.

Onus of proving that a domicile has been chosen in substitution for domicile of origin lies upon those who assert that the domicile of origin has been lost and that the domicile of origin continues unless a fixed and settled intention of abandoning the first domicile and acquiring another as sole domicile is clearly shown.

Superintendent and Remembrance of Legal Affairs, Govt. of Bangladesh Vs. Adyaita Chandra Adhikary. (1981) 33 DLR 314.

Due process of law.

Violation of—Government and its officer's colossal irresponsibility in discharge of responsibility 'imposed by law causing great sufferings to an innocent citizen.

Radha Kanta Banik Vs. The Deputy Commissioner of Rangpur (1979) 31 DLR 352= (1957) 9 DLR (SC) 21.

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Subject: Words and Phrase

Delivery Date: 1970-01-01

Words and Phrases

"Earnest" and "earnest money"

Earnest is something which must be given in the shape of money or some tangible thing at the time of the conclusion of the contract and should be available with the seller for forfeiture in case the transaction fails through the fault of the purchaser.

Earnest money must be paid at the time of the conclusion of the contract; it must be lying with the seller and that it is not the case any promise to pay the amount in lieu of earnest money cannot be treated as such and cannot be forfeited for the breach of the contract.

In a case where the seller besides forfeiting the earnest money has also after notice to the purchaser sold the goods in question, it is his duty to account for the sale proceeds and if the sale proceeds are sufficient to reimburse his claim, he must

refund the amount lying with him as earnest money. The seller has no option either to forfeit the earnest money (and keep quiet) or to forfeit the earnest money and reimburse his losses by selling the goods at the risk and cost of the defaulting party; If he exercises the option and the sale proceeds are more than sufficient to meet his claim, then both in equity and law, he is bound to refund the amount of the earnest money forfeited by him. *PLR (1960) WP 685.*

Easement—Right of way when cannot be claimed.

A right of way, as an easement of necessity, cannot be claimed for a convenient shortcut and for avoiding a cumbrous detour.

Abdul Hamid Vs. Abul Hussain (1978)30 DLR 304.

Educational institution

Requisition of such institution under the Government authority for the purpose of allowing it to function properly cannot be found fault with.

Deputy Commissioner Vs. Winifred Rubi (1982) 34 DLR (AD) 162.

—Rendering service beneficial to the nation— Because of the high charge in tuition fees—not a valid ground to overlook its importance.

The school is in the heart of the city of Dacca and it is catering education for about 2000 students in three shifts. Obviously it is rendering a service to the community in general in training the future generation of the nation. If the fees are high the Court has nothing to do because it is essentially a question of bare economics.

Bangladesh represented by the Deputy Commissioner Vs. Winifred Rubi (1982) 34 DLR (AD) 162.

"Election" what the term connotes'.

Election means something more than mere fixation of date and time of election and the making of programme for election.

In its comprehensive sense, 'election' embraces the whole procedure whereby an entire process whereof the declaration of a candidate as duly elected is the result. In other words, 'election' means all the different steps or stages of the election, commencing from the issue of notification calling upon the constituency or the electorate to elect and ending with the publication of the result of the poll. These steps or stages of election do necessarily include, among others, scrutiny of nomination papers and their acceptance or rejection, declaration of results of the election and the certification of the name of the candidates declared elected.

Serajul Islam Vs. Mr. Farid Ahmed (1968) 20 DLR 202.

Election dispute.

Rejection of a ballot paper, which was cast in favour of a particular candidate, without giving him opportunity against the rejection of the ballot paper offends the principle of natural justice.

Md. Nurul Haque Joardar Vs. Province of East Pakistan (1971) 23DLR 17.

—Appeal before the Commissioner while the dispute is pending with the Collector—Not maintainable. *Ibid.*

Election Tribunal

Election petition before Election Tribunal which has powers of a civil court under CPC.

An Election Tribunal has all the powers of a Civil Court trying a suit under the Code of Civil Procedure for the purpose of trying the election dispute.

Abul Basher Chowdhury Vs. Habibur Rahman Mia (1979) 31 DLR (AD) 296.

Employees in autonomous body— Procedure to follow in domestic enquiry against employees.

Disciplinary action against employees in autonomous bodies do not attract provisions of Articles 133 and 135 of the Constitution of Bangladesh.

The present proceedings arc in relation to autonomous bodies for holding domestic enquiries. In taking disciplinary action against employees engaged in autonomous bodies the procedure prescribed for taking disciplinary action in the service rules should be complied with. The elaborate procedure and requirements which are available in a court of law to an accused or the protection available in accordance with the service rules framed under Articles 133 and 135 of the Constitution of Bangladesh are not binding upon the employer for taking disciplinary action against its employees.

Md. Loqman Vs. BADC (1980) 32 DLR 83.

—Employees of Nationalized Industries.

Employees of Nationalized Industries are not Government servants or persons in the service of the Republic. Even in the case of government servants or persons in the service of the Republic, they are not entitled to the benefit of any recommendation of the Pay Commission unless such recommendations are implemented by the Government by publishing it in the official gazette under Act XXXII of 1975.

Manager, A industries Vs. Abdus Sattar (1979) 31 DLR 58.

Employer and employee.

Law governing service conditions in statutory corporation.

We are concerned in these two appeals with the statutory bodies of public character, viz Bangladesh nail Industries Corporation and Janata Bank and in law governing the

viz Bangladesh Jute Industries Corporation and Janata Bank and in law governing the employees of such bodies may be briefly stated as follows:

(a) If an employee is dismissed or his service is terminated in contravention of mandatory statutory provision, the employee has a right of action either in a Superior Court in its writ jurisdiction or in a Civil Court.

(b) If the service of its employee' is terminated in violation of the principle of natural justice the employee has a similar right of action as in (a).

Employee of a statutory corporation is not a government servant or public servant—When an employee of a statutory corporation is entitled for declaration of nullity—Precedent hearing or compliance with principles of natural justice in case of dismissal of an employee of statutory corporation.

BSI Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41.

—Employees of statutory corporations entitled to challenge wrongful dismissal or termination under writ jurisdiction.

SM Masood Al-Mamun Vs. Bangladesh (1977) 29 DLR 393.

—Act XXXI1 of 1975 passed in order to face challenge on issues of service re-organization, but in the absence of necessary notifications the Government is without any shelter. *Ibid.*

—An employee of a statutory corporation is entitled to a show cause notice before he is dismissed. *Ibid.*

—Employee of a statutory body (here it is a nationalized Bank) may be dismissed without show cause notice in accordance with the terms of his employment.

Md. Shamsuddin Vs. Janata Bank (1977) 29 DLR 62.

—Employer and employee—Relation between them in matters of service condition to be governed by natural justice.

In the absence of any statutory provision regulating the service condition the law of master and servant will apply. In the case of the employees who are not governed by the statutory law the minimum requirement is that the principles of natural justice should be followed. It is not the case that a servant can always cling to his office because the employer has a choice.

Kushtia Sugar Mills Vs. Abdul Wadud (1975) 27 DLR 76.

Enemy Property

Appellant after purchase is in possession of the property—before ii could be treated as enemy property the authority concerned must prove that the appellant or his vendors migrated to India before the Enemy Property Law came into operation in 1965.

Abul Khair Miah being dead his heirs: Abul Kashem and others Vs. Bangladesh & others (1980) 32 DLR (AD) 29.

—Custodian of the Enemy Property treating a property as being a vested property without lawful basis for treating it as such and leasing out the same to another is unauthorized and illegal.

Hiralal Agarwala Vs. Deputy Commissioner, Bogra (1979) 31 DLR 359.

—**Notification of 3rd December, 1965.**

A property being an enemy property cannot be dealt with by execution of a will—The property being but an enemy property the title to the property is not extinguished but only eclipsed—So a suit for Icuers of administration in respect of that property shall not be dismissed but stayed until the time it remains a vested property.

Goutam Ranjan Sen and ors. Vs. Bangladesh and ors. (1981) 33 DLR (AD) 175.

—Treating a property as an enemy property on the basis of an enemy property case started in 1978 is not valid in law.

Niuya Gopal Roy Barman Vs. Pran Gopal Nandi (1980) 32 DLR 11.

'Entertain' a suit is not the same thing as "execute a decree".

The Court below observed 'the present execution cannot be entertained". This view is wrong.

In respect of suit the prohibition is against entertaining the same. So far as execution of a decree is concerned, the mandate is that no Civil Court shall "execute any decree". The word "entertain" cannot apply to the expression "execute any decree."

Sankar Bank Ltd. Vs. Sultan Bhuiya (1968) 20 DLR 63.

'Entertain'

The word 'entertain' means to receive and to take into consideration and, therefore, it signifies initially the duty of the Court when proceeding is sought to be started before it.

Amjad Ali Vs. Asadulla (1952) 4 DLR 165.

"Entertained the suit".

Means that the suit shall not be considered by the Court and not that the filing of the suit is barred.

Dwarika Nath Das Vs. Md. Abdulla (1960)12 DLR 423.

"Equal protection of law".

Equal protection of law does not require that absolutely the same rule shall apply to all citizens irrespective of different circumstances. It merely enacts that equal protection and security of the laws should be given to all under like circumstances and conditions in the enjoyment of their civil rights.

Yick Wo Vs. hopkins (1886) 118 U/s. 357 rel. Shaikh Shamsul Huq Vs. Prov. of East Pakistan (1958) 10 DLR 417.

Equitable charge or assignment.

Transactions such as cases of hypothecation or mortgage of movables not in existence at the time of assignments by way of charge on future goods are not governed by Transfer of Property Act and since equity regards that as done which ought to be done, such mortgages or charges arc valid as equitable assignments fastening upon the property as soon as it comes into existence.

Kazi Abdul Ali Vs. Nurut Amin (1955) 7 DLR 406.

Equity—Latches.

Equity cannot assist plaintiff where there is undue laches on his part.

The defendant had executed a bainapatra in favour of the plaintiff to sell the suit properties to him on a certain date. It was specifically stipulated in the said contract that the plaintiff would take all necessary steps for obtaining permission for the sale of the properties. But the plaintiff did not take any step for obtaining permission before that date. When after that date he obtained permission and filed a suit for specific performance of contract it was held; equity should not assist where there had been undue latches on the part of die plaintiff.

Purnendu Kumar Das Vs. Hiran Kumar Das (1969) 21 DLR 918.

"Error apparent on the face of the record"

It is not one if it is not self-evident and has to be established by long argument.

Mufjalur Rahman Vs Fajal Karim (1976) 28 DLR 303.

'**Erroneous decisions'**—and 'decision obtained with an error apparent on the face of the record'—Review permissible in the latter case. *Ibid.*

Evidence—admissibility

Evidence of PW whose conduct was hypocritical vis-à-vis the plaintiff can also be accepted.

Statement of witness, if hit by the rule of hearsay, is not admissible in evidence.

Md. Nurullah Choudhury Vs. Golam S Kazi (1974) 26 DLR 70.

Md. Nurullah Choudhury Vs. Golam S Kazi (1974) 26 DLR 76.

—Misreading or misrepresentation of evidence whereby merits of a decision is affected vitiates the judgment.

Khondkar Mohiuddin Vs. Syed Moin Ahmed (1976) 28 DLR (SC) 85.

—Fraud, undue influence need not always be proved by oral evidence—Circumstances may be relied on for the purpose.

Although the onus is strictly on the defendants to prove fraud and undue influence and coercion in the face of the admitted signature of Asghar on the document, we cannot in the mere absence of oral evidence on the subject hold that the case of fraud, coercion and undue influence has not been made Out in the circumstances as disclosed and particularly, when the excitant is dead, who being man of failing health with financial worries reduced himself to a puppet.

So far as the legality of the mutation effected. it is sufficient to state that this is merely an executive order which cannot confer title.

SM Lulfullah vs. Bibi Badrunnessa (1968)20 DLR 1019.

—Direct evidence having been disbelieved on good reasons, corroborative evidence in connection there is of no help to the prosecution's case.

Rahman Baksh Vs. The State (1970) 22 DLR 482.

"Evidence Act".

The Evidence Act' does not apply in terms to these proceeding under the Workmen's Compensation Act which arc of a summary nature.

Messrs. Ahmad Brothers Vs. Mahmoodul Hassan Khan (1965) 17 DLR (WP) 49.

Evacuee Laws.

Evacuee Laws—Evacuee laws enacted by Pakisian; validity extends to the former *State of* Khairpur.

Fatoomal Vs. Reh. Commr (1969)21 DLR (SC) 291

Exchange of currency—Relevant date for conversion of foreign currency.

Two irrevocable letters of credit were opened by the defendant Bank, at the request of the plaintiff, a partnership firm. The payment for the goods was to be made at Calcutta on presentation of shipping documents including invoices in duplicate and bills of lading.

The letters of credit were to be available for negotiation to the extent of the amount mentioned by means of bills 'at sight' drawn on the plaintiff without recourse, accompanied by duplicate signed invoices and complete sets of "clean" bills of lading. One set of bills was presented for payment to the plaintiff on the 15th September, 1949 and the other set of bill was presented on the 16th September, 1949. The plaintiff refused payment thereof n those date, on the ground that the bills were not clean bills of lading. On the 17th September, 1949. India devalued its currency and the ratio of a hundred Pakistani Rupees became Rs. 143-8-0 of the Indian currency. The State Bank of Pakistan declared public holidays under the Negotiable Instrument Act, following this devaluation and the actual payment was made by plaintiff to the defendant-Bank on the 24th and the 27th of September, 1949, respectively.

The plaintiff did so under protest at the pre-devaluation rate i. e. at par. The suit was instituted on 18-9-55 by the plaintiff contending that the liability to pay in this case was not incurred till the State Bank of Pakistan gave permission to remit the foreign currency to India, as such, the liability must be assessed at the post-valuation rate.

Question arose as to the determination of the relevant date for converting the Indian currency mentionable in the two bills of exchange into Pakistan currency, for the purpose of meeting those bills.

Held: The relevant date for conversion of the foreign currency into Pakistani currency in such case would be the date on which the bill of exchange matured for payment and the liability for payment incurred, that is, the date of conversion of the currency should be the date on which the payment fell due.

SM Hanif (Dacca) Ltd. Vs. Central Bank of India (1962) 14 DLR (SC) 308.

Exclusive possession

Exclusive possession may also be used with no higher meaning than 'sole possession'. *54 CWN (2 DR) 191 (1931. col).*

—The proposition that the test of exclusive possession is by no means decisive cannot be said to be of general application.

Dhamai Tea Co. Ltd. Vs. Arjoon Kumari. (1979) 31 DLR 433.

—Exclusive possession may not be a decisive test in favor of a tenancy, but it still remains a consideration of the first importance. *Ibid.*

Executing Court's jurisdiction

Decree—Execution of decree—Decree-holder not at a liberty at his own will to strike out execution proceedings.

Md. Joynal Abedin Vs. Nagendra Chandra Majumdar (1971) 23 DLR 124.

"Ex parte" and "legal proceedings"

The expression "ex parte" in Article 3 of P0 12 of 1972 governs diverse proceeding—Civil, Criminal, revenue and others. Legal proceedings include suits, cases, prosecution, appeal, revision and review.

The word "ex parte" admits of no other interpretation than to mean an order passed in the absence of any of the contending parties.

Maksud Ahmed Vs. Sunil Kumar (1979) 31 DLR 275.

Ex parte adverse finding—payment of compensatory cost.

The adverse findings against the appellant in the judgment cannot be sustained because those were made in the absence of the appellant. In the absence of those adverse findings there could not be any occasion, far less, raising the question of payment of compensatory costs to the respondent.

Habibullah Khan Vs. Shah Azharuddin Ahmed (1983)35 DLR (AD)72.

Ex pane decree—Requirements of law necessary to pass an ex parte decree— Court's duty when called upon to pass a ex-parte decree.

The plaint is no evidence for the proof of the case of the plaintiff. The absence of the defendant who asked for adjournment but refused on reasons assigned therefore cannot give occasion for the plaintiff to obtain ex-parte decree without producing the relevant documents on the basis of which relief is sought for. The Court is bound to apply its mind with reference to the pleadings and satisfy itself as to what should be the proper proof for passing a decree on the basis of the averments made in the plaint.

Bangladesh Vs. Abdul Wadud (1973) 25 DLR (SC) 90.

—Non-filing of written statement after several documents obtained for the purpose does not operate as a valid ground for an ex pane decree without complying with the necessary provision of law for such a decree.

It appears to us that Courts below considered that non-filing of written statement by the defendant after obtaining several adjournments absolved the Courts from the responsibility to examine the legality of the claim of the plaintiff. The claim of the plaintiff is based on works which requires measurement and such measurement-books and accounts were not filed; the bill on the basis of which the claim is based was not before the Court and on the top of it the schedule of work, as per tender, was not also before the Court for which the plaintiff was required to undertake the work and the rate of Taka 100.00 for the work of the thousand cft. was not stated in evidence. So we find it difficult to hold that the ex pane decree can be sustained in law.

Bangladesh Vs. Abdul Wadud (1973) 25 DLR (SC) 90.

—When a nullity—Decree fraudulently obtained is a nullity.

Decree-holder by suppressing summons obtained the ex pane decree fraudulently and this finding of fact has been arrived at both by the Appellate Court below and the High Court Division. Such a decree obtained fraudulently is a nullity in the eye of law. It is by practicing deceit and fraud that the decree was obtained and when such fraud and deceit is established, a decree has no existence in the eye of law and it must be

set aside.

Abul Khair Mia Vs. Abdul Latif (1980) 32 DLR (AD) 167.

Ex-post facto

Ex-post facto law—What is—There is no fundamental difference between retrospective and ex-post facto law. The former expression is used in respect of civil matters and the latter in respect of criminal matters which by their nature arc more serious.

Nabi Ahmed Vs. Home Secretary, Govt. of West Pakistan, (1970) 22 DLR (SC) 20.

Expungement of condemnatory remarks.

Condemnatory remarks about the role of an Advocate in the conduct of a case before a Court in the judgment appertaining to proceedings in relation to that case is permissible—Such condemnatory observation having a serious adverse effect (in the present case the appellant had to tender resignation of the office of Advocate-General) is to be avoided except when urgency of occasion imperatively demands it.

Khalid M. Ishaque Vs. Chief Justice and Judges of West Pakistan High Court (1966) 18 DLR (SC) 366.

Fair wages, living wages, and minimum wages.

A minimum wage is the irreducible amount considered necessary for the sustenance of worker and his family and for the preservation of his efficiency while the living wages is the ideal which enables the workman to provide for himself and his family a measure of comfort also. Fair wage. is between these limits and while for a minimum wages employers' capacity to pay is not a relevant consideration, it is so in the case of the fair wage.

Dalmia Cement Co. Vs. Dalmia Cement Factory Workers (1958) 10 DLR (SC) 157.

Family

"Family", what the word means.

The explanation of family as given under explanation (b) of section 20 the Act cannot be applied, in the case of the family of waked, for disposal of the portions of the property which devolve on all the legal heirs and representatives of the wakeef. The position of a mutwalli is as good as other legal heirs and representatives of the wakeef. In that view of the matter mutwalli alone cannot reap the benefit of the property set apart as secular property.

Shamsuzzoha Nurul Amin Chowdhury Vs. Province of East Pakistan (1970) 22 DLR 376.

Female witnesses—If their veracity can be questioned on the ground that they are

Female witnesses—If their veracity can be questioned on the ground that they are females.

Only because of the fact that all the witnesses are females their statements should not be believed has got no substance. There are no reasons to disbelieve their evidence. If in a house where husband and wife reside and if the husband is killed in that case only witness would be the wife to see the occurrence of killing of her husband.

There is no law in the country not to believe the evidence of female witnesses and convicting a person relying on their evidence. In this Connection we may refer to cases reported in AIR 1938 Mad. 740 and the case reported in AIR 1963 Supreme Court, page 364 wherein it was held that only because the witnesses are female, their evidence cannot be discarded.

Noor Islam & ors. Vs. State (1984)36 DLR 123.

Ferries and Sairat Mahals

Ferries and Sairat Mahals are vested in the Local Councils under BD Order.

In the case of ferries and other sairat mahals wi. ch have been vested in the Local Councils any pcrin who feels himself aggrieved by anything done by a Local Council in managing any sairat mahal shall seek remedy before the Controlling Authority and not before a Revenue Officer. *A Local Council is not a Revenue Officer.*

Bangshi Choudhury Vs. Reazuddin (1969) 21 DLR (BR) 31.

Final—' Decision shall be final'—Doe s not affect High Court's revisional power. *Anil Das Vs. Mostaque Ahmed (1966) 18 DLR 86.*

—Final Explained

Kaikaus, J—It was contended that as the order dismissing the application for confirmation of sale for want of income-tax clearance certificate implied a refusal to confirm this refusal was final and a new application was incompetent.

Held: The word "final" in section 43 of Pak (Administration of Evacuee Property) Act would only mean that a point which has been decided in a proceeding cannot be reagitated. If the application was dismissed on the merits, the merits could not be agitated again, but if the application was dismissed because of want of an income-tax clearance certificate the only point that was decided was that a valid clearance certificate did not exist. That point cannot be agitated again except by way of appeal, review or revision, but the filing of a fresh application which is supported by a clearance certificate is not incompetent.

Ata Ullah Malik Vs. Custodian of Evacuee Property (1964) 16 DLR (SC) 298.

—The word 'final' (occurring in sec. 29 (6) of the EB Premises Rent Control Act) means that the order of the Rent Controller, subject to the result of an appeal to the District Judge, is Final. it does not, however, take away the jurisdiction of the High Court to interfere with the District Judge's order under section 115 CP Code.

Azizul Haq Vs. Hanif (1955) 7 DLR 287.

Fiscal Law, liability under

Principle applicable to it—The principle of all fiscal legislation is that if a person sought to be taxed comes within the letter of the law, he must be taxed. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free from liability, however apparently the spirit of the law might otherwise appear to be.

Ebrahim Paper Mart Vs Assistant Collector of Customs (1956) 8 DLR (WP) 71.

"Fishery"

Right of fishery, what it is and how it accrues—Presumption as to the such right—Where a land is settled, then the presumption is that the land with fishery right belongs to the lessee—Government's claim of the right of fishery in the water over the land of the lessee—invalid.

Province of East Pak. Vs. Tasiruddin Ahmed (1968) 2ODLR 435.

—Fishery right may be separately owned from the ownership of subjacent land—When land settled with no reservation as to user of it, presumption is land with fishery right transferred. *Ibid.*

—Cannot be acquired.

Rights of fishery in a navigable river are not a profit arising out of land and cannot be acquired under the East Bengal State Acquisition and Tenancy Act. Right of fishery in a navigable river—not an encumbrance. A several fishery is an incorporeal right and cannot be acquired under the EB Stale Acquisition and Tenancy Act.

Inland fishery falls within the definition of "estate" and "land" and, as such, can be acquired.

Md. Tazammal Hossain Vs. Prov. of East Pak. (1959) 11 DLR 145.

—Lease of the land under water.

If a landlord grants a lease of a land to somebody, he cannot claim the right of granting any fishery right in any portion of" the land, which may be under water, in the absence of an express reservation to the effect; and the landlord if he chooses to do so, may grant a lease of the fishery right in respect of land which may be under water to one person and may give a lease of the land itself to another.

Nawab Ali Munshi Vs. Sadagar Bapari (1957) 9 DLR 540.

"Fishing right"

—Fishing right, delivery of possession— delivery of possession in case of a fishery right, when it is no more than symbolic delivery, cannot Oust the person in possession of fishery even though a restraining order was passed upon the person in possession.

Ambar Ali Talukdar Vs. Ajman Ali (1967) 19 DLR 221.

"Fixed rent"

The term "fixed rent" does not always connote a permanently fixed rent for all time to come. Its proper construction depends upon the context of the document in which it occurs.

KB Kishor Acharyya Chowdhury Vs. Prov. of East Bengal (1954) 6 DLR 1(21 rt. h. col.).

"FOB contracts—are contracts where the duty of the seller is to deliver the goods on board ship at his own expense, upon which prima fade the property and risk passes to the buyer, who is liable for subsequent charge, and payment for the goods become due". (Legal & Commercial Dictionary, by S. D. Mitra)

"FOB (free on board) contracts arc contracts where the duty of the seller is to deliver the goods on board ship at his own expense, upon which prima fade the property and risk passes to the buyer, who is liable for subsequent due". (Haisbury's Laws of England, 3rd Ed. Vol-34 p. 10).

"FOB" or "free on board" means on board a ship to be named by the buyer, and the seller's contractual duly is there and then to pass the property in the goods sold to the buyer. Whether or not the seller in fact passes the property to the buyer on shipment, the risk passes.

The presumption would, therefore, appear on principle to be that in the case of a f. o. b. contract, the seller intends to fulfill his contract and that the property is intended to pass, and does pass, on shipment' Carger's Carriage of Goods by Sea, 10th Ed p. 728 (Also see British Shipping Laws, Vol-5, para 395).

"It is impossible to assume that commercial practice would condone the right of a seller f. o. b. to betray the original buyer by allowing him to withdraw the goods after delivery to the carrier. It is suggested, therefore, that whether the correct inference in f. o. b. sales is that property passes forthwith subject only to an unpaid seller's lien, or conditionally upon payment, a retention of the bills of lading by the seller, even if they arc issued to his own order, should not be construed in a manner which is inconsistent with commercial practice. In other words, that any such retention should be regarded in conjunction with the object of securing the purchase price of the goods only."

Bismillah Oil Mills. Vs. Messrs Arag Lid. (1982)34 DLR 134.

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(1)The normal incidence of a f. o. b. contract is that property in the goods passes to the buyer on shipment;

(2)The parties, however, may intend that property shall pass at a subsequent time, as for example, on payment of price and charges and on such event property shall pass at such subsequent time;

(3)Intention is a question of fact and has to be gathered from facts and circumstances of each case.

(4)The mere fact that a f. o. b. contract provides for handing over of bills of lading against payment does not justify a presumption that property is to pass on payment;

(5)A retention of the bills of lading by the seller should not be construed in a manner which is inconsistent with commercial practice. Any such retention should be regarded in conjunction with the object of securing the purchase price of the goods only, that is to say, property should be construed to pass shipment subject to unpaid seller's lien.

Even if the seller has retained the shipping documents for securing the price of goods by providing that the documents shall be delivered on payment, there is a presumption in a f. o. b. contract that property passes on shipment unless a contrary intention has been expressed. *Ibid.*

Foreign Judgement

Exception cannot be taken to foreign judgment arrived at on correct view of principles of international law.

Hasham Issaq Vs. Karachi Gas Company Ltd. (1969) 21 DLR (WP) 129.

Forfeiture

Forfeiture, relief against—Compromise between parties embodied in a decree—Stipulation to discharge the mortgage or to obtain a deed of release by a certain date —Time, if essence of contract and whether relief can be granted against forfeiture. *35 CWN (DR-I) 103.*

Forgery

Forgery or fraud—Main ingredient is dishonest or fraudulent intention—Mere interpolation even unauthorized no proof of forgery or fraud— Without proof of bad intention there can be no fraud or forgery.

Mir Ghaus Baksh Bizanjo Vs. Chief Election Commission of Pakistan (1970) 22 DLR (WP) 178.

Fraud—A party to a fraud cannot take advantage of his own fraud.

The contention was that a particular part of a transaction was described as a loan to evade payment of income-lax but it was not actually a loan but an advance payment of rent.

Held: If the parties deliberately chose LO give the transaction a particular form they must take the consequence, a party to a fraud is not allowed to plead his own fraud.

Abdur Razzak IHowlader Vs. SK Muhammad Shafi(1962) 14 DLR (SC) 119.

—"Fraud"— when can be presumed in a sale set aside case.

The landlord obtained an *ex-parte* rent decree against the plaintiff of the present suit, whereupon the plaintiff brought the present suit for setting aside the said rent decree on the ground of fraud.

The following circumstances were found to exist in the present case, namely, that the service of summons was not effected at the address where the plaintiff had been residing, that the landlords were interested in getting and in fact got a decree in excess of the kabuliyat rate coupled with the fact the landlords had not taken the stand that there was a mistake as regards service of summons for which they could not be held responsible.

Santosh Kumar Mitra Vs. Hrishikesh Mondal (1961) 13 DLR 278.

—Co-sharer causing the property to sold.

Proof of fraud, as against a co-sharer who has caused a property to be sold—circumstances indicating fraud enough.

Ratanlal Chakraburtty Vs. Shomnath Chakrabartty (1957) 9 DLR 112.

—An *ex-parte* decree can be set aside by a new action when the Court passing it had been misled by fraud. To sustain an action for setting aside 'a decree the fraud alleged and proved must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance.

Azizur Rahman Vs. Sudhangshu Kumer Mitra (1952) 4 DLR 636.

—Fraud on Court as well as on parties

As to cases where fraud is committed upon the Court as well as the parties, a Court has inherent jurisdiction to interfere in exercise of its power vested in s. 151 CP Code.

Mofazzal Molla Vs. Parul Bala Debi (1972)24 DLR 116.

—Matters of inference—Proof of fraud is matters of inference from the facts and circumstances of the case and the evidence as received before the Court. Each circumstance by itself may not mean much, but taking all of them together they may reveal a fraudulent or dishonest plan, on the question at what Lime the persons who have been guilty of that fraud commenced it, the Court is to draw a reasonable inference from their conduct.

Karnaphuli Paper Mills Ltd. Vs. Amanullah, Proprietor (1971) 23 DLR 150.

—Fraud on the minority by the majority

When an act did amounts to a fraud on the minority in a company an individual member of the company may sue the majority.

Shamsul Huda Vs. Jalaluddin Ahmed (1979) 31 DLR 5.

—Remedy.

In case of fraud on a party the only remedy is in a suit. *Mofazzal Molla Vs. Parul Bala (1972) 24 DLR 116.*

—Must specifically be alleged and proved—General averment of fraud will not do.

Ibrahirn Vs. Surendra Kumar Dhar (1957) 9 DLR 16.

—To substantiate fraud, mere allegation of non- vice not enough—Particulars as to person who admitted fraud with other materials must be given as also evidence in support thereof.

Sajeda Khatoon Vs. Mostafa Khatoon (1976) 28 DLR 222.

—Fraud, undue influence—need not always be proved by oral evidence—Circumstances may be relied on for the purpose.

Although the onus is strictly on the defendants to prove fraud and undue influence and coercion in the face of the admitted signature of Asghar on the document, we cannot in the mere absence of oral evidence on the subject hold that the case of fraud, coercion and undue influence has not been made out in the circumstances as disclosed and particularly, when the executants is dead, who being man of failing health with financial worries reduced himself to a puppet.

SM Lutfullah Vs. Bibi Badrunnessa, (1968) 20 DLR 1019.

—A fraud: When not a fraud—False representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy.

Matira Bewa Vs. Sudhir Chandra Saha (1983) 35 DLR 56.

—Vitiates all proceedings.

Fraud vitiates all proceedings—Contravention of the provision of law is no ground for allowing an order obtained by fraud to stand.

Md. Idris Khan Vs. Haji Erfanuddin (1957) 9 DLR 601

—Fraudulent contrivance enough to make an auction-purchase invalid.

If the auction sale is brought about by fraudulent contrivance on e part of the decree-holder, then it cannot be said that the auction-purchaser, even though he is not involved in the fraud itself, should be allowed to be protected.

Nijamul Huq Faraji Vs. Panchanan Podder (1969)21 DLR 78.

—Fraudulent sales—nothing passes even to a bonafide purchaser for value without notice.

Md. Mazaharul Huq Choudhury Vs. Nagendra Lal Dey. (1957) 9 DLR 456.

—Judgment or order obtained by fraud—Duty of Court to re-call suo molts in appropriate cases— Single Judge may re-call order of Division Bench obtained by fraud. *(1955) PLR (Lah) 111.*

—Plea of—Parties pleading fraud must set forth full particulars of fraud and the case can only be decided on the particulars laid. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice, however strong the language in which they arc couched, may be. *Ananta Kumar Bepari Vs. Jamini Mohan Das. (1952) 4 DLR 487.*

—D by a fraudulent misrepresentation induced P to execute some documents affecting P's title to the suit property. P sued D for cancellation of those documents. Defense was that P came to know about the real nature of the transaction much earlier and the Suit was now barred by limitation.

Held: The burden to show that P had clear and definite knowledge of those facts which constituted fraud, at a time which is too remote to allow P to bring the suit, lies heavily on *D.*

Sm. Dhinamoni Bewa Vs. Sm. Saraswaii Namdasi (1953) 5 DLR 334.

—Where default in payment of revenue in respect of an estate is made by both the plaintiff and the defendant, and the defendant (a co-sharer) purchased the property in a sale held for such arrears cannot be compelled to reconvey the plaintiff's share of the property to the plaintiff even though the defendant may have been guilty of fraud. Section 90 of the Trusts Act, 1882 has no application to such a case. *53 CWN (DR 1) 3.*

'From date'

The Court directed the deposit of money within 15 days 'from date'.

Held: In computing the period of 15 days, the day on which the order was passed should be excluded.

Sri Sri Radha Madhav Bigraha Vs. Dhira Urao. (1953)5 DLR 20.

'Functus officio' The general rule is that once an order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the order is functus officio and it cannot set aside or alter the order, however, wrong it may appear to be. The order can be set aside or altered only on appeal.

Pujaratana Unnause Vs. Waharekar Somittra Unnause (1952) 4 DLR (PC) 1.

Fundamental Rights.

Question whether the enactment is violative of Fundamental Rights remains suspended till the Emergency is lifted.

Hamidul Haq Chowdhury Vs. Bangladesh. (1981)33 DLR 381.

—With reference to a number of Fundamental Rights enumerated in Part II of the Constitution of 1956, they do not derive their entire validity from the fact of having been formulated in words, and enacted in the Constitution of 1956.

A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilized mode.

The concluding words of sub-section (7) of section 2 of the Order of the 10th October, have not the effect of bringing to an abrupt end the proceedings in the petitions before the High Courts commenced by the convicted persons.

State Vs. Dosso (1959) 11 DLR (SC)1 (43).

—Writ petition based on—Withdrawn and dismissed on abrogation of the Constitution of 1956.

Sargodha Bhera Bus Service Vs. Prov. of West Pak. (1959) 11 DLR (SC) 285.

Fundamental Rules—Government has unfettered discretion to retire ministerial servants at 55 years of age. Rule 56(b)(i).

Pakistan Vs. Liaquat Ali Khan (1959) 11 DLR (SC) 73.

"Next Below Rule"—An officer out of his regular line should not suffer by forfeiting acting promotion which he would otherwise have received had he remained in his regular line. *(1957) 9 PLR (Dac) 1147.*

Officiating post—Pay—When an employee is promoted to officiate in a higher post involving the assumption of duties and responsibilities of greater importance he is

involving the assumption of duties and responsibilities of greater importance he is entitled to the minimum pay of the grade to which he was promoted to officiate Rr. 30 and 35.

Post Master-General, Eastern Circle (EP) Vs. Muhammad Hashim (1971) 23 DLR (SC) 49.

'Garment' and 'hose',

The words 'garment' and 'hose' used in the notification [No. SRC 165 (R) 67] in their popular as well as their trade or business sense connote to be articles of dress or covering for human use.

Karnaphuli Rayon Vs. Bangladesh (1976) 28 DLR (SC) 116.

—Garment and hoses herein mean wearing apparel for human use.

'Garment' in its dictionary sense may mean an article of dress, a clothing of any object including an inanimate object like rayon yarn cake. But if the notification is read as a whole along with the Schedule it leaves no doubt that garment definitely refers to hosiery goods woven on the knitting machines in the form of some human wearing apparel. *Ibid.*

General power of attorney

A general agent may be one that has authority to act in all matters of a particular nature. The several acts which he may be expected to do for achieving the object may constitute one transaction, but the power that is conferred on him may be general in so far as that contemplated transaction is concerned. Such a power-of-attorney is special for the Stamp Act and general for making the contemplated transaction. *PLR (1960)1 WP 504.*

'Generalia special non-derogant'

In case of conflict of a general provision with that of a special provision in a constitution, the special provision should prevail. Reference by the President under Art. 162 of the Constitution (1957)9 DLR (SC) I 78;

Jibendra Kr. Acharyya Chowdhury Vs. Prov. of East Pakistan. (1956) 8 DLR 457.

Government—What this means—It does not mean an abstract entity—but means a body of persons vested with executive authority of State.

Govt. of Bangladesh Vs. Md. Habibur Rahman (1979) 31 DLR (AD) 151

—Government not to avoid implementing decrees. Department's practice of evading financial implications of decrees deprecated—Writ jurisdiction not to be made use of for enforcing declaratory decrees.

Govt. of West Pakistan Vs. Fazal-e-Huq Musarrat (1960) 12 DLR (SC) 88.

—Government functionary.

Government functionary in cases where land held jointly by co-sharers cannot gel possession without partition suit—No authority can take possession of a property belonging to several co-sharers on the ground that the authority acquired complete right over the land belonging to some co-sharers; the course open to him is to file a suit for partition.

Anil Kumar Dutta Chowdhury Vs. Province of Pakistan, (1971) 23 DLR 108

—'Government Servant'—What the expression signifies.

Government Servant means and includes every person who for the time being is in the service of the Government of Bangladesh or any corporation constituted under any law for the time being in force and every person who on the basis of having at any time been in the service of Pakistan purports to claim any right to employment in the service of the Government.

Bangladesh represented by the Secretary, Ministry of Power & Water Resources Vs. Md. Misfor Au (1982) 34 DLR (AD) 304.

—His status: Legal relationship between the Government and its servant is not an ordinary contract between master and servant—Government's servant's position is one of status regulated by law.

Dr. Nurul Islam Vs. Bangladesh represented by the *Secretary (1981) 33 DLR (AD) 201 (203).*

—Temporary employee with a continuous service for several years stands on a different footing than other temporary employees.

Md. Ismail Hossain Vs. Govt. of Bangladesh (1975) 27 DLR 353.

—Punishment for misconduct— Authority awarding punishment not bound by what the enquiry officer says—where a favorable order has been passed in favor of a delinquent officer, reversal of such order must be based on reasons which should be recorded—An order awarding punishment is always a judicial order.

Mir Alauddin Ahmed Vs. Prov. of E Pak. (1974)26 DLR 27.

—Placement in certain category—No reduction in rank.

Since the petitioner by a placement (in certain category) have not suffered any reduction in pay or rank, it cannot be said that their reversion has in the present circumstances been done by way of punishment but it has been done to remove a

glaring anomaly which escaped notice earlier.

SM Masood Al-Mamun Vs. Bangladesh (1977) 29 DLR 393.

—Employees of Corporations who are not Government servants—Provisions of Article 135 of the Constitution of Bangladesh not applicable to them. They can invoke writ jurisdiction in case of violation of any statutory right—In case where the rule of master and servant prevails writ jurisdiction cannot be invoked. *Ibid.*

—Dismissal of, on ground of corrupt practice.

Sub-divisional Collector of Food after holding an enquiry gave the petitioner benefit of doubt on the charge of corrupt practice and recorded reasons in support of his conclusion. The District Controller without giving any reason as to why he did not accept the finding of Sub-divisional Controller dismissed the petitioner from service —

Held: The order of dismissal is not legal.

Mir Alauddin Ahmed Vs. Province of EP (1975) 27 DLR 393.

—Promotion of—Promotion is not made on the basis of seniority only; for other factors, such as efficiency, suitability, honesty, etc. are also to be taken into consideration in the case of a promotion.

Ghazi Md. Ekhlas Mia Vs. Bangladesh (1976) 28 DLR 397

—Claim to arrears of salary—Not a contractual debt—Claim rests on bounty of State — Action at law for enforcement does not lie.

Govt of *West Pakistan Vs. Fazal-e-Huq Musarrat (1960) 12 DLR (SC) 88.*

—Expression "deemed to be a government servant" does not necessarily mean a government servant. The expression that he is deemed to be a "Government" servant in Annexure "B" has been used for a limited purpose, that is, for the purpose of prosecution in a Criminal Court. He will be treated as a public servant as defined in s. 21 of the Penal Code, and for the purpose of regulating his conduct and taking disciplinary measure, when necessary, he will be subject to the Government Servants (Efficiency and Discipline) Rules. These provisions do not necessarily make him a Government Servant.

Keramat Ali Talukder Vs. Election Tribunal (1979) 31 DLR 1.

—Dismissal:

No Authority subordinate to one by whom a Government servant is appointed shall be competent to impose a penalty of dismissal against a Government servant.

Province of East Pakistan Vs. Abdul Latif Talukder (1970) 22 DLR 589.

—**Punishment awarded for corruption—**Screening Board recommending light punishment— Government awarding higher punishment.

The Appointing Authority awarding a higher punishment (dismissal of the delinquent officer) than that recommended by the Screening Board (which held the enquiry against the delinquent officer) commits no illegality, since it is so authorized by P0 67 of 1972 and in giving higher punishment it is not necessary that the officer concerned should be given notice regarding proposed higher punishment.

Abdur Rahsid Vs. Bangladesh (1980) 32 DLR (AD) 201.

—Government's right to retire

Central Government has all the right to retire an officer after 25 years of service without giving any reasons.

Government has unfettered discretion to retire ministerial servants at 55 years of age.

Pakistan Vs. Liaquat Ali Khan (1959) 11 DLR (SC) 73.

—Service liable to be terminated by one month's notice—No drastic action against him was taken after inquiry on charges of misconduct—but his service terminated by one month's notice— Termination not necessarily mala fid.

Abdul Karim Vs. Prov. of West Pakistan (1960) 12 DLR (SC) 295.

—**His retirement—**The date was 30.1.73 and thereafter he was on leave for 6 months preparatory to his retirement. This 6 months' leave is a retirement benefit. An order by the Government suspending him from service passed after 30-1-73 and during the period when he was enjoying 6 months preparatory leave can be held as an order passed when the servant was not in Government service—Therefore, such order passed treating him in service is ineffective and unlawful.

Syed Abdul Ali Vs. Secretary, Establishment Division (1979) 31 DLR (AD) 256.

—Relation between a civil servant and the State.

The relationship between a civil servant and the State is essentially contractual though his services would be terminable at the pleasure of the State, but as long as that pleasure was not exercised, there was a binding contract which could be enforced, if necessary, by action against the State.

Pakistan through General Manager, NWR Vs. AV Issacs (1970) 22 DLR (SC) 371.

—Government servants violate law.

Here is a case where litigation is being conducted on behalf of the Government by Government officers in utter disregard of public policy and public money.

KM Morshed Vs. Executive Engineer (1976)28 DLR 449

Grievance.

The word 'grievance' defined—Grievance connotes infliction of wrong or hardship on a person, injury or oppression; a cause or source of injury, In modern use something (real or supposed) which is considered a legitimate ground of complaint.

Sh. Allah Diya Vs. Abdul Qadeer (1971) 23 DLR (Lahore) 15.

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WORDS AND PHRASES [H - K]

Words and Phrases

Habeas corpus.

Order of imprisonment passed by Military Court—Court's jurisdiction of interference more restricted.

When the challenge is from an order of a Court Martial set up under the Army Act to enforce the Military law, the jurisdiction to interfere is more narrow than in the case of other Court or Tribunal.

Jamil Huq Vs. Bangladesh (1982) 34 DLR (AD) 125.

—Court to see the validity of the order

Jurisdiction of the High Court Division in an application in the nature of habeas corpus, is to see, if a person in custody is there in pursuance of any lawful authority, and when a person is serving out an order of sentence passed by a Court or tribunal, the jurisdictional validity of that order could be looked at.

Jamil Huq Vs. Bangladesh (1982) 34 DLR (AD) 125.

Habit—"Habit" explained—The word "habit" implies a tendency or capacity resulting

Habit – Habit, explained – The word 'habit' implies a tendency or capacity resulting from the repetition of the same act. It means a persistence in doing an act. a fact which is capable of proof by adducing evidence of the commission of a number of similar acts.

Siddiqullah Vs. The State (1970) 22 DLR 491.

'Hakam'

The word hakam should be regarded in its ordinary sense of judge or arbiter. One who is only a conciliator is neither a judge nor an arbiter.

Mst. Bilquis Fatima Vs. Najim-ul-Ikram Qureshi (1959)11 DLR (WP) 93.

'Haat'—immovable property.

Rents and profits out of a market arc benefits arising out of the land and, therefore, come within the definition of immovable property under sec. 2, cl. 5 of the General Clauses Act and can be treated separately from the land itself, and can be subject matter of separate lease and mortgage independently of the land on which it sits.

Prafullah Kumar Sarkar Vs. Kshemada Kinkar Roy (1952) 4 DLR 215.

—Haats which are held once a week fall within the definition of vacant non-agricultural land under sub-clause (iii), clause (b) of section 20(2) EBSA & T Act and, therefore, haats cannot be acquired by the Government under section 3(2) of the Act.

Yusuf Ali Chowdhury Vs. Prov. of East Pakistan (1959) 11 DLR (SC) 316.

—'Haat and Bazar'.

The word 'cultivable' clearly shows that the legislature never intended to include haat and bazar within clause (ii) of section 20 (2) (b). *Ibid.*

—Market as an immovable property means the benefit arising Out of the land in the shape of rents and profits derived from the market itself though the market sits of the land.

Prafulla Kumar Sarkar Vs. Kshemada Kinkar Roy. (1952) 4 DLR 215.

—Where the plaintiffs are not interested in all the plots on which the haat sits,—in some plots the plaintiffs having no interest, they cannot independently of their title to the land claim a share in that portion of the market which sits not on their land but on the land of somebody else. If they or any of them have got no interest in that land they cannot claim it as a benefit arising out of their own land, the right to hold the market being an incident attached to the ownership of the land.

They also cannot acquire any right by prescription on account of the fact that the haat sits in those plots for a number of years as no such right by prescription can be acquired. *Ibid.*

—Right of a party to hold a haat—Mere proximity not a valid ground for restraining another haat to be held

another haat to be held.

Mizanur Rahman Vs. Serajuddin Bepari (1981) 33 DLR 212.

—Leases of small plots therein—Permission for construction of pucca structures on leased plots cancelled.

Abdul Gafur Vs. Government of East Pakistan (1969) 21 DLR (BR)2.

Hearsay evidence—Hearsay evidence—Its admissibility or otherwise—Statement made quite apart from its truth is relevant for certain purposes.

SM Qamrurzaman Vs. State (1981) 33 DLR 156.

—Though hearsay evidence is not evidence of the fact deposed to yet in certain circumstances it can be looked to for some collateral purposes and cannot just be shut out.

SM Qamruzzaman Vs. State (1981) 33 DLR 156.

High Court—High Courts several jurisdictions: (1) Original civil jurisdiction, (2) extraordinary original civil jurisdiction and (3) special jurisdiction.

The original civil jurisdiction of the High Court was confined to the trial of suits arising within the local limits of that jurisdiction. The extraordinary original civil jurisdiction was given for the removal and trial of suits pending or falling within the jurisdiction of Courts subordinate to the High Court. Every other jurisdiction of a civil nature conferred by the Letters Patent would be best described as special jurisdiction or as statutory jurisdictions, since some of those jurisdictions were to be exercised under existing statutes.

The jurisdiction invoked for affecting an increase of the court-fee must obviously be described as a constitutional jurisdiction of an original kind.

Ahmad Khan Vs. Chief Justice (1968)20 DLR (SC) 235.

—High Court Division of the Supreme Court—High Court Division of the Supreme Court shall 1ave such jurisdiction as is or may be conferred on it by law.

Alhaj Md. Ruhul Amin Vs. Dhaka Municipal Corporation (1984) 36 DLR 1.

—High Court and Subordinate Court: Subordinate Court when amenable to the High Court—explained.

When one has to consider whether a court is subordinate to the High Court within the meaning of section 115 CP Code, it is not enough to show that it is a subordinate court in the sense of being a court of an inferior grade or status, it must be shown that it is subject to some authority of the High Court. The word subordinate

contemplated by section 115 CP Code is the subordination, not arising out of the subjection to appellate or supervisory jurisdiction but the subordination arising out of a statutory provision.

Fatima Khatun Vs. Manindra Madhab Chaki (1969) 21 DLR 856.

—One Division Bench as against another such Bench:A Division Bench of the High Court cannot interpret the Judgement of another Division Bench of the same Court. A Court after delivering its Judgement becomes funcrus officio with regard to that Judgement. The remedy lies in moving the superior Court, i.e., Supreme Court.

Chairman, Chittagong Port Trust Vs. Port Trust Workers Union (1969) 21 DLR 771.

—High Court's power of superintendence:

The power remained in fact except for a short period when First Great War was waged and Mahathma Gandhi started Civil Disobedience Movement for liberty—Pakistan's belated Constitution conferred, though rather lately, this superintendence power— Ups and down of Pak. Constitutions—Arrival of 1971, with chaos and confusion—Dark as well as brightest periods of our national life—Emergence of Bangladesh as an Independent Sovereign State— Bangladesh Constitution promulgated on 16.12.72. Survey shows that except under the Martial Law regimes during Pakistani rule High Court retained its supervisory power over all subordinate Courts.

AT Mridha Vs. The State (1973) 25 DLR 335.

—High Court's power of superintendence over all subordinate courts, including Courts vested with special jurisdiction necessary—Otherwise individual liberty would be at stake.

After all, freedom, liberty, etc., are the cherished desire of the individuals. If in the process of a given proceeding the liberty is strangulated illegally the superior Courts must interfere for the protection of the individuals and that interference can be done by, amongst others, the superintending power of the High Court and this is more so since Courts are created with exclusive jurisdiction by special enactment containing an ouster clause of jurisdiction. If the Special Courts having exclusive jurisdiction will function beyond the control and superintendence of the higher judiciary—a proposition which it is dangerous to conceive of in a society which is governed by rule of law.

AT Mridha Vs. The State (1973) 25 DLR 335.

—High Court's superintending power— Guaranteed by Art. 109.

Power of superintendence and control envisaged in Article 109 shall be exercised in the interest of justice who involves a duty on the part of the High Court Division to keep all Courts and Tribunals subordinate to it within the bounds of their authority. This means the High Court can interfere when necessary in the interest of justice.

AT Mridha Vs. The State (1973) 25 DLR 335.

—Original Civil Jurisdiction of the High Court.

Ordinary Original Civil Jurisdiction of the High Court is not governed by the Code of Civil Procedure, and it is governed by the Original Side Rules, 1914.

Saleh Steel Industries Ltd. Vs. TSS Pacific Abeto (1983)35 DLR (AD) 188.

—High Court Original Side Rules.

Under the Original Side Rules of the High Court the appearance of a Senior Counsel is permissible only if he is assisted by an Attorney who is invariably an Advocate of this Bar.

Rules 18, 21, 22 and 24 of the High Court Original Sides Rules indicate that whenever a bill of cost is presented to the Taxing Officer it can only be entertained when it is presented by an attorney.

Govt. of Bangladesh Vs. MR Khan (2976) 28 DLR 215.

—High Court Bar Association Rules. Rr. 29 and 31: Proviso—Calling of Special General Meeting during summer vacations on show notice does not contravene any of die rules—In view

of proviso to rule 31, it is not necessary to send special notice by post to every member—Proceedings of the Special General Meeting so convened was not irregular and resolution passed thereat was valid.

President, High Court Bar Association, Lahore Vs. Raja Maula Dad (1970)22 (WP) 201.

Hire-purchase agreement.

There is a distinction between hiring and acquisition of goods upon payment of installments and each has different legal consequence.

Where the transaction is a sale, a third party bonafide purchaser acquires a good title to the goods against the owner notwithstanding the provision that the ownership in the goods would remain with the original owner until the entire purchase-price was paid; whereas in a hire-purchase agreement such third party cannot acquire a better title against the owner.

The main distinguishing feature of a hire- purchase agreement is that a hirer has a right to terminate the agreement for hire at his pleasure and is not bound to pay the value of the goods. In a contract of sale for price payable by installments, the purchaser has no option of terminating the contract and returning the goods.

Arabindra Poddar Vs. Shew Ram Das Agarwalla. (1960) 12 DLR 229.

Holding over.

Upon the death of an original tenant in respect of an immovable property, the

Upon the death of an original tenant in respect of an immovable property, the tenancy being one from month to month, the tenancy does not cease to exist and the heirs and legal representatives of the original tenant do not become trespassers but having continued in possession they become tenants by holding over and have an accruing interest out of the original contract.

Gouri Bala Pal Vs. Kunja Lal Saha (1960) 12 DLR 37.

—The right of holding over, unless conferred by a statute, cannot be implied or inferred by analogy.

Osman Ali Vs. Sukwnar Majumdar (1978) 30 DLR 250.

'Hypothecation' and 'pledge'—What they mean.

A mortgage of moveable, if not accompanied with possession, is called hypothecation. A pledge is chargeable under Article 6. So far as the question of hypothecation is concerned the possession over the property is detained to the owner and only certain right in the moveable property is transferred to the persons in whose favor the property is hypothecated.

Chairman, National Board of Revenue Vs. M/s. GMG Corporation Ltd. (1983) 35 DLR (AD) 262.

'**Ignorance of law'—explained—** ignorance of law is no excuse' is a time honored maxim of Roman Law and it means that the effect of a law purporting to create a right or impose an obligation cannot be frustrated, or evaded on the plea of its ignorance. It does not mean, that when a law of procedure itself provides that a breach of its provision is excusable, on proof of a sufficient cause of such a breach, ignorance of law cannot be considered as a sufficient cause.

M/s. Rahman Huq & Co. Vs. Commr. of Income Tax (1975) 27 DLR 403.

Illegal dispossession.

Illegal dispossession by Government officers— An act of extreme high-handedness.

The petitioner had acquired valid right, title and possession of the property in question. As a citizen of the country the petitioner was entitled to due protection of law. When he could legitimately expect due protection from the Government for maintaining his rightful possession, he was instead illegally dispossessed by the Government officers themselves.

Rage Ali Vs. Bangladesh (1982) 34 DLR 185.

Illustration— Cannot modify the language of section which alone is the law.

Aryyasthan Insurance Co. Vs. Nurul Islam Chowdhury (1958)10 DLR 510.

Impleading of parties

Impleading of parties—Impleading Custodian of Enemy Property in a suit when not necessary.

Plaintiff's property vested in the Government as enemy property. This was subsequently released in his favor on satisfactory proof of his title through an exchange deed of sale. In a suit brought by the plaintiff for ejectment of the tenant who was on the properly it was contended on behalf of the tenant in assertion of his (tenants) claim over the property that the property being an enemy property the suit was not maintainable as the Custodian of Enemy Property was not made a party to the suit.

Held: When the property was released in favor of the plaintiff, there is no difficulty to deal with the case in the absence of the Government or the Deputy Custodian of the Enemy Property as a party in this suit.

Gaustha Behari Banik Vs. Habibullah Majumdar (1970) 22 DLR 846.

'Incorporate Company'

An incorporated company has got the fundamental attribute of a corporate personality which is entirely distinct from that of its members, and the property of the company is distinct from that of its members whose only properties are their shareholdings.

New Dacca Industries Ltd. Vs. Quamrul Huda (1979)31 DLR (AD) 235.

Individual

'Individual', what it means.

The words "individual', as expressed in section 16(3)(a)(iv) of Income-Tax Act means an individual who Is capable of having a wife. It, therefore, means a male individual.

Mst. Akbari Begum Vs. Commr. of Income Tax (1970) 22 DLR 365.

"Indoor management"—its meaning.

The doctrine of 'indoor management" is to the effect that persons contracting with a company and dealing in good faith may assume that, acts within its constitution and powers have been duly performed and arc not bound to enquire whether acts of internal management have been regularly done.

In the present case the lessee entered into an agreement of lease on the terms settled by the Secretary of the Society. It was subsequently contended on behalf of the Society that the Secretary was not authorized, by the Managing Committee to enter into any contract and as such, the lease was not a valid lease.

Held: As the Secretary was entitled under the by-laws of the Society to enter into contract on behalf of the Society the lessee was not required to enquire whether the Society actually authorized the Secretary to enter upon the contract. Such transaction with the Society is saved by the doctrine of "indoor management".

Pakistan Employees Cooperative housing Society Ltd., Karachi Vs. Anwar Sultana (1969) 21 DLR (WP) 345.

Injunction.

Long possession, even against a rightful owner, injunction will lie—Rightful owner cannot evict him by force but will have to establish his right by due process in court of law.

Md. Gafar Vs. Azimuddin (1984)36 DLR 242.

—Permanent injunction—Plaintiff to prove his exclusive possession and prima facie title.

In a suit for permanent injunction the plaintiff's arc required to prove their exclusive possession in the Suit land and a prima facie title. *Md. Gafar Vs. Azimuddin (1984) 36 DLR 242.*

'Insolvency.

Person adjudged insolvent—Adjudication can be annulled by Court if petition was not bonafide or there has been "abuse of the process of Court".

Abdul Shakoor Vs. Ali Muhammad (1969) 21 PLD (Karachi) 339.

Insubordination.

When returning of transfer order does not amount to insubordination.

Worker protesting against his transfer order and returning it with endorsement on the margin that his transfer was against the collective agreement arrived at between employer and the employees.

Field: Course adopted by the worker was proper and he is not guilty of insubordination for returning the transfer order.

Workers of Bata Shoe Co. Vs. Bata Shoe Co. (1971) 23 DLR (SC) 60.

Insurance—Motor insurance policy— Conditions in such policy should be construed against insurers and in case of ambiguous expressions Court should lean in favor of insurance— Breach of condition—Burden of proof lies upon insurers.

Abdul Majid Khan Vs. Eastern General insurance Co., (1969)21 PLD (Karachi) 363.

—Insurance company's liability

Insurance company is liable for loss if goods arc proved to have left warehouse and put on board ship—Slight evidence is required to prove shipment—Further insurance company's subsequent declaration that policy covered also risks incurred during

company's subsequent declaration that policy covered also risks incurred during transshipment is enough evidence of shipment.

Haji Moosa Haji Omar Vs. Ahmed Abdul Ghani, (1968) 20 DLR (WP) 158.

Interest—Payment of, in a suit.

The question whether interest is to be paid to a person or not is to be decided on the basis of the surrounding circumstances in a case and a decision in this regard is to be based on the equities of the case. *Sk. Shamsul Huda Vs. EP WAPDA (1972) 24 DLR 123.*

—Interest on award money by—the arbitrator not contemplated by E.B. Act XIII 1948.

Province of East Pakistan Vs. Malu Bepari (1973) 25 DLR 440.

International law and Municipal law.

It is well settled that where there is municipal law on an international subject, the national Court's function is to enforce the municipal law within the plain meaning of the statute.

Bangladesh Vs. Somboon Asha Vahaen (1980) 32 DLR (AD) 194.

"International Law"—Succession of international person.

A sovereign when granting independence has power to impose what terms and conditions he pleases to the taking over of his obligations by the new State. But if nothing is said about a particular obligation then it cannot be deemed to have been taken over by the new state.

Federation of Pakistan Vs. M/s. Dalima Cement Co. Ltd. (1962) 14 DLR (Sc,) 197.

Interpretation of statutes

—Preamble—When language is not open to doubt, preamble can neither restrict nor extend enacting part.

—Rights, whether public or private, cannot be taken away or even hampered by mere implications from language in absence of express words.

Syed Abul Aata Maududi Vs. The State Bank of Pakistan (1970)22 (WP) 178.

—Interpretation of penal statute— Elementary rule in interpreting a statute is to give full and accurate effect to every word used in the statute—To the exposition of penal statute courts arc not to narrow its construction—Courts are not entitled to scan or widen the policy of Legislature.

The State Vs. Ghulam Jafar (1970) 22 DLR (WP) 244.

In valid law

Action taken under an invalid law— Consequence that follows.

If an action taken under the invalid law was incompetent because the law itself was invalid, there may be cases where by validating the law retrospectively the action itself becomes competent with it and no further validation of action is needed.

Mofizur Rahman Khan Vs. Bangladesh (1982) 34 DLR (AD) 321.

—Involuntary unemployment—meaning of—It means the inability of the worker to work due to lockout by the employer or as a result of the strike which is not an illegal strike or by intermittent period of involuntary unemployment which means power or machine failure or civil commotion, over which neither the employer nor the employees has any control.

Adamjee Jute Mills Ltd. Vs. Chairman, Industrial Court, (1969)21 DLR 94.

"Issues"—Decision on all issues should be given by the trial Court.

Abu Syed Rashid Bakhi Vs. Mukhtar Bakht Mazumdar (1967) 19 DLR 65.

'**Jote**'—may mean interest of a tenure-holder. *Ajufannessa Vs. Safar Miah (1978) 30 DLR (SC) 41.*

—Judgment must be read as applicable to the particular facts proved. That every judgment must be read as applicable to the particular facts proved or annexed to be proved since the generality of the expressions which may be found there arc not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

Ful Chand Das Vs. Mohammad Hammad (1982) 34 DLR (AD) 363.

—Judgment-—Foreign Judgment—Foreign Judgment—Exception cannot be taken to foreign judgment arrived at on correct view of principles of International Law.

Hasham Issaq Vs. Karachi Gas Company Ltd. (1969) 21 DLR (WP) 129.

—Summary disposal—disapproved. Summarily dismissing a petitioners petition under Article 98 defeats the ends of justice which is the primary function for which the Courts of law exist—.-Courts of law under obligation to spare that conscientious efforts in reaching their conclusion in adjudication of matters brought before them in course of judicial process which gives a suitor the impression that his cause has received a fair treatment—Disposal by summary orders deprives the superior courts of the benefit of the lower courts' views.

Litigants who bring their disputes to the law courts with the incidental hardships and expenses involved do expect a patient and a judicious treatment of their cases and there determination by proper orders. A judicial order must be a speaking order manifesting by itself that the cowl has applied its mind to the resolution of the issues involved for their proper adjudication. The ultimate result may be reached by a laborious effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with its painful results that justice has neither been done nor seems to have been done is inescapable.

When the order of a lower court contains no reasons, the appellate Court is deprived of the benefit of the views of the lower court and is unable to appreciate the processes by which the decision has been reached.

Mollah Ejahar ali Vs. Government of East Pakistan (1968) 20 DLR (SC) 221.

Judicial act—The term 'judicial act' is used in contrast with purely ministerial acts.

Diwan Ziaul Huq Vs. Govt. of West Pakistan (1956) 8 DLR (WP) 59.

—Judicial, quasi-judicial or administrative tribunal—Whether particular act of a tribunal is judicial or quasi-judicial or administrative.

The question whether an act is judicial, quasi- judicial or administrative is clouded by a confusion which it is extremely difficult to resolve.

The true question in which character a tribunal acts always is whether the act which is complained of is a judicial act and not whether the procedure adopted by the tribunal is judicial or quasi-judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi-judicial or administrative body. A tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial.

Twig Transport Vs. Sargodha Bhera Bus Service (1959) 11 DLR (SC) 140.

—Judicial power of the Superior Court As distinguished from jurisdiction of the Superior Courts.

Judicial power of the superior courts can never be taken away. This power exists as long as the court exists. This power is available even where the jurisdiction of the superior courts has been barred.

Judicial power of the High Court cannot be taken away by Martial Law Regulation No.1 which has been passed in pursuance of the Proclamation by saying no judgment, decision or sentence of a Martial Law Court shall be called in question in any manner whatsoever including the Supreme Court.

Haji Joynal Abedin Vs. State (1978) 30 DLR 571.

Judiciary—Its independence—Its power cannot be curbed except by legislative authority.

In a democratic country with an independent judiciary, the jurisdiction of the superior courts are not to be interpreted to have been taken away, and if it is so intended it may be done by the appropriate legislative or constitutional authority by express words and not by implication.

Jamil Huq & ors. Vs. Bangladesh & ors. (1982) 34 DLR (AD) 126.

Courtesy that is due to the Superior Courts.

While mentioning about the superior courts, the subordinate courts should not mention in such manner. This attitude of the learned Additional District Court is highly deprecated and is noted with disapproval.

The High Court Division cannot in exercise of its jurisdiction under section 115 CPC alter the finding of facts.

M/s. Subarna Trading Co. Ltd. Vs. M/S. Overseas Traders (1982) 34 DLR 142.

Jurisdiction.

Jurisdiction, ouster of—Specific provisions is always provided in law when depriving a court of its jurisdiction.

Whenever the legislature intended to take away the jurisdiction of the Court, it did so by express provision.

AT Mridha Vs. The State, (1973) 25 DLR 335.

—Court's jurisdiction (in Pakistan) taken away by contract entered in a bill of lading—Such Court has and locus standi to entertain the suit.

Held: Maintainability of the suit against the agent of the shipper in Pakistan is a question of fact as to whether or not the agent has any liability, and it is to be found by the trial Court. If it is found that he has no independent liability the trial Court will be competent to strike off the agent as well.

Swedish East Asia Co. Ltd. Vs. Mohammad Masood Raza (1969) 21 DLR 343.

—Discretion cannot be exercised arbitrarily— Court can interfere to examine reasonableness in exercise of discretion and set aside discretion found to have been exercised arbitrarily.

Makramullah Vs. Province of East Pakistan (1969) 21 DLR 455.

—Ouster of superior court jurisdiction under the Martial Law cases to be effective from 7th June, 1962.

Mehr. Din Vs. Border Area Committee (1970) 22 DLR (SC) 227.

—Exclusive jurisdiction clause—In a bill of lading, whereby the jurisdiction of local courts in Pakistan is ousted in respect of any dispute referred to in the bill of lading being opposed to public policy and derogatory to country's sovereignty is void.

MA Chowdhury Vs. Messrs; Mitsui OSK Lines Ltd.. (1970) 22 DLR (SC) 334.

—Jurisdiction of the Labor Court— Previous notification superseded by subsequent notification—Previous notification in respect of territorial jurisdiction of the Labor Court was superseded by a subsequent notification reconstituting the territorial jurisdiction of the Labor Court. It was contended that as the previous notification was superseded by the subsequent notification without any saving clause, all pending proceedings on and from the date become or in other words cease to have any legal effect.

Held: This contention does not in the present case hold good because the analogy of a repeal of an Act without providing for a saving clause cannot be applied in case of notification issued by Executive Government exercising delegated function.

M/s. Gammon (East Pakistan) Ltd. Vs. The Chairman, 2nd Labor Court (1971) 23 DLR 148.

—"Jurisdiction", objection as to— When will be disallowed by appellate Court.

If objection to the territorial jurisdiction is taken in the Original Court and it is wrongly disallowed the appellate or revisional Court will not entertain the objection unless there has been a consequent failure of justice.

Pakistan Vs. Muhammad Abdul Kuddus (1968) 20 DLR 332.

Jurisdiction of the Court:

Question of jurisdiction of a court can be raised at any stage so long as that question is not dependant on determination of any issue of fact.

Manager Swiss Boring Over-Seas Corporation Ltd. Vs. Shamsul Huq (1969) 21 DLR 435.

—Jurisdiction of Industrial Court—for ensuring harmonious relationship.

In order to bring harmonious relation between the employer and the employee in the interest of industrial peace the dispute and any matters relating to the dispute can also be determined by the Industrial Court.

Nishat Jute Mills Ltd. Vs. Nishat Jute Mills Workers, (1969)21 DLR 27.

—Jurisdiction of the Court—Ouster of such jurisdiction can—only is claimed when an

order or action is one not done in accordance with law and bonafide.

Held: It is well settled that the jurisdiction of the Civil Court cannot be completely ousted even in the face of express ouster of jurisdiction in given statute. It has been repeatedly laid down by several judicial pronouncements that any provision made in a particular statute barring the jurisdiction of the Civil Court to call in question any order passed or action taken under the statute gives protection to orders which arc made with jurisdiction, made within the framework of the statute and made bonafide.

Dy. *Secretary, Ministry of Commerce Vs. Nizamuddin Ifaider (1985) 37DLR 102.*

—Exclusive jurisdiction conferred on a tribunal cannot be immune from being challenged if the tribunal acts illegally, or acts malafide. *Ibid.*

Ouster of Court's jurisdiction—not to be readily inferred.

Ouster of Court's jurisdiction is not to be readily inferred and even where there is an express ouster of the court's jurisdiction the court still retains its jurisdiction to see if the order passed was with jurisdiction or malafide or was in accordance with law. If the order is with jurisdiction and it is in accordance with law then it is not for the court to substitute its own views or opinion on the merits for the decision of the authorities concerned.

Board of Intermediate and Secondary Education Vs. Masudul Alam (1976) 28 DLR 406

—In legal parlance, by jurisdiction of a Court, it is generally meant to be the authority or power which is conferred upon a Court by the Legislature to hear and determine a cause between the parties and to carry the judgment into effect.

Govt. of Bangladesh Vs. Sumir & Co. (1976) 28 DLR (SC) 21.

—Exclusion of the jurisdiction of the Courts must either be explicitly expressed or clearly implied and is not to be readily inferred. Even if the jurisdiction is so excluded the court still retains jurisdiction to examine if the provisions of the Act have been complied with or whether the statutory tribunal has acted in accordance with the fundamental principles of judicial procedure.

Md. Abdul Jabbar Vs. Asia Khatun (1976) 28 DLR 333.

"Kabala and ekrarnama"—Kabala and agreement of repurchase (ekrarnama) executed in the same sitting—they form contemporaneous agreements and enforceable in law.

*Nurruddin Ahmed Chowdhury Vs. Gunnu Meah (*1967) 19 *DLR 404.*

Kabuliat and Pattah

Pattah and kabuliat do not create relationship of landlord and tenant unless they are delivered up.

Baburam *Mandal Vs. Renuka Bala Roy Chowdhury (1960)12 DLR 517.*

'Kaimi'

The term kauni does not import fixity of rent. The word kaimi according to Wilson's glossary is: Relating to what is perpetual; the perpetual settlement of the revenue, and so conveys the notion of the fixity of rent.

KB Kishore Acharyya Vs. Province of East Bangal (1954) 6 DLR 1(19).

—The word kaimi is of the same category as mukarruri but its import is not exactly the same. The term kaimi imports permanence of occupation but not fixity of rent. The word is not at all appropriate to a tenancy at-will; nor is the word usually used to create a life-interest. Unless there is anything to compel the contrary view, it imports an intention to create an estate extending beyond the life of the grantee.

Kalipada Saha Vs. Nitya Nanda Saha (1953) 5 DLR 285.

—Kaimi means permanence of occupation and not fixity of rein.

Mahbubul Huq Vs. Shaikh Ak- med (1958) 10 DLR 323.

"Karta"—The term "Karta" in the case of Hindu Joint Family means manager.

Commissioner of Income-tax Vs. M/s. Kalimohan Shaha (1962) 14 DLR 258

Khadem

Khadem—attached to a mosque—status of, in relation to a property of the mosque—possesses no power of transfer by lease, etc. being a mere servant.

Isab Shaikh Vs. Asaruddin Shaikh (1956) 8 DLR 422.

'Knowledge'

A clear and definite perception of necessity particulars of a fact may be said to constitute 'knowledge' which is, in essence, a question of fact, to be determined in the facts and circumstances of each case.

Md. Hossain Vs. Amir Hossain (1977) 29 DLR 225.

—What constitutes knowledge.

A precise or exact perception of the necessary particulars of a fact is the determinant of the 'knowledge' which is essentially a question of fact.

Habibur Rahman Vs. Satish Chandra (1977) 29 DLR 178.

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WORDS AND PHRASES [L, M, N]

Words and Phrases

Labour Court

Court granting more reliefs than asked for— principle to follow.

The Manager Spencer & Co. (Pak.) Ltd. Vs. Spencer's Employees Union, (1973) 25 DLR 102.

'Labour dispute'

A registered Trade Union functioning and discharging function of a recognized Trade Union. Some clerks of a Company having been retrenched their cause was taken up by a Trade Union and conciliation proceeding was initiated. The question of retrenchment of these clerks then becomes a labor dispute.

Mohiuddin Vs. PRS Ltd. (1977) 29 DLR (SC) 117.

—A recognized Trade Union preferred over an unrecognized trade union. *Ibid.*

Land Acquisition Court—When making assessment of compensation acts as an

Land Acquisition Court—When making assessment of compensation acts as an arbitrator— When such a court determines question pertaining to title in a compensation proceeding, it functions as a court of law attracting provisions of CP Code.

Bangladesh Vs. Abdul Mannan (1977) 29 DLR (SC) 17.

Land development

—Development of land by leasing Out the same for construction of buildings on the side of a big road is connected with the development of Bangladesh and as such acquisition of such land cannot be objected to.

Development of the land on the side of a big road under a project appears to be connected with the development of Bangladesh and it was a part of the scheme for which the lands were acquired.

Aftabuddin Mullah, Vs. Chairman, Khulna Development Authority (1982) 34 DLR 261.

—If land is acquired for one purpose and is directed to another public purpose for which the land is being used is a different one, being outside the purpose of requisition and acquisition, the requiring body was competent to do it since the other purpose is also a public purpose. *Ibid.*

Land—dispossession from.

Person in possession of land can only be dispossessed by another having better title.

When a defendant is in possession he could be evicted only by person having a better title than he. In such suit, plaintiff can only succeed by proving his better title over suit land.

Lal Meah Vs. Md. Ibrahim (1976) 28 DLR (SC) 61.

Landlord and tenant—denial of the landlord's title—forfeiture.

In a suit for ejectment by landlords the denial of the title of the plaintiff would in law result in the forfeiture of the right of the lease-hold interest of the defendants.

Bayza Bibi Vs. Debendra Lal Roy (1950) 2 DLR 360.

'Last installment' and 'last year'—The expression 'last installment' in the 2nd proviso to sub-section (2) of section 2 of the Bengal Land. Revenue Sales Act means installment preceding the sale and 'last year' in the same proviso means the year previous to the year preceding the sale and, therefore, when the sale took place on account of arrears of excess of March kist of 1950, on 26.6.50, then under the proviso to sub-section (2) of section 2 there could not be any sale for arrears of cess due in March. 1950 and the sale held for such an arrear by the Collector was without jurisdiction and the sale is liable to be set aside and declared void.

Abdus Samad Chowdhury Vs. Shamsuddin Ahmed (1960) 12 DLR 385.

Latches

The doctrine of latches in Court of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted—in either of these cases lapse of time and delay are most material.

John Ojobo Agbeygbe Vs. Festus Makene Ikomi (1953) 5 DLR 219 (PC).

—But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course not amounting to a bar by any statute of limitation, the validity of that defense must be tried upon principles substantially equitable. *Ibid.*

—Two circumstances always important in such cases are the length of the delay and nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy. *Ibid.*

—Where a suit struck out and was relisted after a lapse of nine years and having regard to the Length of the delay the inadequacy of the explanation of the delay and consequences of setting aside a sale of land as against a bona fide purchaser for value who had been i1i occupation of the land during the whole period and had apparently altered the buildings thereon— such a suit ought not to have been re-listed and having been relisted ought to have been dismissed. *Ibid.*

Late delivery—Loss of market

Damages on account of late delivery of goods carried by the ship—Principle for calculating loss for late delivery as in the case of transit by land. Wherever the circumstances admit of calculations as to the time of arrival and probable fluctuation of the market being made with the same degree of reasonable certainty in the case of a sea, as of a land, transit there can be and reason why damages for late delivery should not b calculated according to the same principles in both cases.

In assessing damages only the circumstances resulting from the breach of contract are to be taken into consideration.

Al-Sayer Navigation Co. Vs. Delta International Traders Ltd. (1982) 34 DLR (AD) 111.

Law

—Question of law, raised—Question of law if not pleaded in the written statement will not debar the court to apply that law, if necessary.

Khan Azizul Hassan Khan Vs. Haji Mohammad Ismail, (1971) 23 DLR (Lahore) 15.

—Before striking down a law having far reaching consequences, Courts should be extremely cautious and act on the principle that the affair should prosper, rather than be brought to naught.

Province of East Pakistan Vs. Sirajul Huq Patwari (1967) 19 DLR (SC) 281.

—Altered during the pendency of the case—Law existing at the commencement of the trial will govern the case, unless the new law is expressly or impliedly given a retrospective effect.

Muhammad Alam Vs. State (1967) 19 DLR (SC) 242.

—Law, change of :—Change of law while

the case pending in the appellate Court—Appellate Court to give effect to the change.

Sayeedur Rahman Vs. Chief Election Commissioner (1965) 17 DLR (SC) 23.

—Durability of, passed by a competent body is permanent.

Sargodha Bhera Bus Service Vs. Prov. of West Pakistan (1959) 11 DLR (SC) 285.

—**Functions of law.**

Official acts affecting rights of the citizens must be based on some provisions of law —Any such acts done not within the ambit of a law unauthorized— Dispossessing a Khadim from the privately owned dargah by the SDO not permissible.

Muniruddin Vs. SDO Chandpur (1975) 27 DLR 382.

—Law in force and law in operation.

Where a law having both force and operation is robbed of its operation by virtue of a judicial finding that its provisions are inconsistent with those in a major law, such law is as much a law in force, as another law duly enacted which awaits a further act of a legislature or competent authority for bringing it into operation.

Prov. of East Pak. Vs. Md. Mehdi Ali (1959) 11 DLR (SC) 318.

Invalid—does not become valid by the mere fact that it remained unchallenged for a long time.

Attorney-General of Australia Vs. The Queen (1958) 10 DLR 9 (PC).

Legislature's power—to make law and also validate actions retrospectively within certain limits. Shahabuddin Ahmed, J (concurred in by F Munim, J., R Islam, J. and B Haider Chowdhury, J).

—There is no dispute that the legislature got power to make a law retrospectively and also to validate actions retrospectively. Retrospective validation may also be conferred upon an Act notwithstanding anything contained in any judicial decision.

Mofizur Rahman Khan Vs. Bangladesh (1982) 34 DLR (AD) 322.

Municipal law and international law—Municipal law prevails over international law and courts are bound to administer law as it stands.

Jagadish Chandra Mazumdar Vs. Commr. of Agriculture Income Tax (1956)8 DLR 327.

—Law of necessity

That which is not otherwise lawful, necessity makes it lawful. *Reference by H.E. The Governor General (1955) 7 DLR (FC) 395 (424).*

Presumption as to its validity

Fair and unobjectionable on its face, conferring absolute powers which may be used arbitrarily cannot be questioned because it is likely to be arbitrarily used—but can be questioned when in fact it is so used.

Jibendra Kishore Acharyya Vs. Prov. of East Pak (1957) 9 DLR (SC) 21.

'Law' and statutory public authority'.

The expression "law" as has been defined in Article 152 of the Constitution of Bangladesh means any Act, Ordinance, Order, Rule, Regulation or Bye- laws, Notification or other legal instrument or any custom or usage having the force of law in Bangladesh. "Statutory public authority" also as has been defined in Article 152 of the Constitution means any Authority, Corporation or Body the activities or the principal activities of which are authorized by any Act, Ordinance, Order or Instrument having the force of law in

Bangladesh. A.Z. Rafique Ahmed Vs. Bangladesh (1980)32 DLR (AD) 84.

Valid law can not be repealed by unconstitutional law.

Valid law can not be substituted or repealed by an invalid unconstitutional law.

Ful Chand Vs. Md. Hammad (1982) 34 DLR (AD) 362.

Validation of invalid law

Legislature's power—Law passed for validating an invalid law—tests—in removing the defect validation of Law does not contravene the Constitution—Conferment of retrospective effect must not encroach judicial power of the court—Legislature can render Judgments, etc. ineffective by removing their basis.

The tests of such validation, besides legislative competence, are that the defect in

the previous invalid law has been removed and the validation of law does not contravene any provisions of the Constitution.

Mofizur Rahman Vs. Bangladesh (1982) 34 DLR (AD) 321.

—Validity of law does not depend on the malafide or bonafide of a law— Circumstances attending changes in different M.L. Regulations might indicate malafide yet in view of the fact that M.L.R. by which amendments have been made to implicate the President in an offence are immune from challenge in any court.

Mostaque Ahmed Vs. Govt. of Bangladesh (1981) 33 DLR 348.

The validity of a validating law—is to be judged by three tests, the first is to see whether Parliament is clothed with the legislative power on the subject. The second is whether by validation Parliament has removed the defect which the Court had found in the earlier law, and thirdly, whether the validating law is consistent with the provision of the Constitution. When all the three tests have been fulfilled, the validation law may operate retrospectively, if Parliament so expresses in the validating document.

Mofizur Rahman Vs. Bangladesh (1982) 34 DLR (AD) 321.

—With validating an invalid law legislature can also validate executive action— Legislature not empowered to reverse court's decision as it does not possess judicial power-Court's decision binding.

It is a settled principle of interpretation that the power of legislature to validate an invalid legislation carries with it the ancillary power of validation of executive orders or actions but like the validation of law, the latter ancillary power is subject to the Constitution. *Ibid.*

—Law Officer and Govt. Servant.

Both a Law Officer and a Government Servant shall hold office during the pleasure of the President, but in the case of a Govt. servant the President's pleasure is subject to other provisions of the condition as expressed in the words "except as otherwise provided by this Constitution."

A Law Officer shall hold office only during the President's pleasure and he may be removed from office at any time by the President without any reasons being assigned for his removal as has been expressed provided in the President's Order No.6 of 1977. The clear distinction between service conditions of a law officer and that of a Government Servant excludes a Law Officer from falling into the definition of a person in the service of the Republic.

Kazi Abdul Wahab Vs. Bangladesh (1979) 31 DLR 332.

Lawyer

Gross professional misconduct—Inhuman act— Expulsion.

Interpolations in the figure of 200 raising it to 1200 and in the figure 50 raising it to 250, etc. in the letter of appointment whereby the appellant inflated his remuneration established—Though the appellant was enrolled as an Advocate of the District Court on 3.1.66 he represented himself as a lawyer since middle of 1965.

Appellant is guilty of gross professional misconduct and his dealings with the respondent inhuman.

Kazi Abdul Khaleque Vs. Kazi Faziur Rahman (1982) 34 DLR 279.

Lease.

A lease for 99 years is not a lease in perpetuity. *MH Khandker, Advocate Vs. Bangladesh (1978) 30 DLR (SC) 1.*

—Grant of lease by SDO in his discretion in regard to the enemy property under the Defense of Pakistan Rules—High Court when moved under Article 102 of the Constitution refuses to interfere with that.

Habibullah Vs. Govt. of Bangladesh (1978) 30 DLR 47.

—Lease of premises for residential and nonresidential purposes fall within the ambit of Premises Rent Control Ordinance of 1963. Lease of nonagricultural lands is a subject-matter which has been dealt with in the EB Non-Agricultural Tenancy Act.

MH Khandker, Advocate Vs. Bangladesh 30 DLR (SC) 1.

—No written document necessary for lease.

Under the Bengal Tenancy Act, no written document is necessary for the creation of a lease in respect of agricultural lands and, therefore, a tenant can prove his tenancy independently of a written lease, if any.

Khan Mohd. Biswas Vs. Chittaranjan Saha (1955) 7 DLR 60.

—Agreement—Lease

Agreement executed by the defendant alone can not be treated as a formal agreement between the parties.

A unilateral document unable to decide question of title.

Dhamai Tea Co. Ltd. Vs. Arjoon Kumari (1979) 31 DLR 432.

Lease-deed—executed and registered not by the party competent to do it but by a 3rd party on the basis of a letter—No title passes.

Ayaz Bahadur Vs. Abdus Sobhan (1978) 30 DLR 15.

—Exclusive possession (by the defendant) for 25 years suggests lease.

Uninterrupted possession of the suit land for 25 years suggests that the defendant was given exclusive possession suggests a lease.

Dhamai Tea Co. Ltd. Vs. Arjoon Kumari (1979) 31 DLR 432.

—Renewal of lease.

Original lease of a plot of land belonging to the Govt. Khas Mohal granted for 29 years contains clause for renewal after expiry of the lease-period. Lessee fulfilled all conditions and duly applied for renewal after expiry of the original period of lease—The authority is bound in terms to grant fresh lease.

Free School Street Property Vs. Bangladesh (1978) 30 DLR 1.

Determination of the purpose of lease—Law application.

The test to determine whether a lease comes under the Bengal Tenancy Act or under the Nonagricultural Tenancy Act is the purpose for which the tenancy is created.

Sarat Chandra Biswas Vs. Mozam Sardar, (2970)22 DLR 102.

"Lease and sub-lease"—difference between

Under the general law relating to transfer of property a sub-lease connotes the transference of only a part of the original lessee's interest, whereas the transference of the whole of the interest in the lease by the transferor amounts to an assignment of the lease-hold interest.

The assignee of a lease stands in the place of the original lessee and becomes a tenant of the original landlord.

A sub-lessee, on the other hand, is liable only to the sub-lessor, he cannot sue or be sued by the original landlord.

Province of East Pakistan Vs. Muhd. Hossain (1964) 16 DLR (SC) 667.

—Lease and license.

Where a person is held to be a licensee and not a tenant in spite of his exclusive possession of the property.

When a requisitioning authority allowed people into possession at a weekly rent, when a landlord told a tenant on his retirement that he could live in cottage rent free for the rest of his life, when a landlord, on the death of the widow of a statutory tenant, allowed her daughter to remain in possession paying rent for 6 months, when

the owner of a shop allowed the manager to live in a flat above the shop. In each of those cases the occupier was held to be a licensee and not a tenant, notwithstanding exclusive possession.

Dhamai Tea Co. Ltd. Vs. Arjun Kumari (1979) 31 DLR 432.

—Lease and Licence distinguished.

If the document only permits another person to make use of the property when the same remained under the legal possession of the owner, then the interest created by the document is a license. If, on the other hand, the agreement grants exclusive possession even for a limited period and for specified purposes then the transaction would prima facie amount to a lease. The entire set of circumstances relating to be taken into consideration before it can be decided whether transaction stipulated is a lease or a license.

Goalundo Fishing Industries Vs. Pakistan, (1970) 22 DLR 349.

—Judicial views on lease and license.

A lease as will appear from section 105 of the Transfer of Property Act is a transfer of an interest in immovable property. During the continuance of the lease the right of enjoyment of the property belongs to the tenant and not to the landlord. The right of ownership as well as the right of which it is composed is rights in rem transferred to the lessee. On the other hand, a "license" as will appear from its definition in section 52 of the Easements Act is merely a competence to do something which except for this permission would be unlawful. It does not confer any rights in physical property.

Dhamai Tea Co. Ltd. Vs. Arjun Kumari (1979) 31 DLR 432.

—Line of demarcation between.

The line of demarcation between a lease and a license will sometime be very thin. A lease is a transfer of an interest in immovable property. Ownership of physical property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part of the rights of ownership i.e., the right of enjoyment of the property, for a period, for consideration. During the continuance of the lease the right of enjoyment of the property belongs to the tenant and not to the landlord.

The right of ownership as well as the rights of which it is composed are rights in rem and not in personam and by the lease a right in rem is transferred to the lessee.

Abdullah Bhai Vs. Ahmed Din (1964) 16 DLR (SC) 169.

—There is in the case the case of a license only a personal agreement between the licensor and the licensee whereby the licensor agrees not to interfere with the doing of particular acts on property which is in his possession. No right in rem passess to the licensee.

The criterion for distinguishing between a lease and a license is simple, i.e., whether any right in immovable property itself, a right in rem, has passed to the person

concerned. But the determination of this question may be difficult in the circumstances of a particular case. Where there is a document the evidence will have to be considered with due regard to the provisions of sections 91 and 92 of Evidence Act, 1872.

Abdullah Bhai Vs. Ahmed Din (1964) 16 DLR 'SC) 169.

—Difference between—Substances to be looked into, not the words used to ascertain real intention.

Golam Mohammad Vs. Hajee Amir Ali (1962) 14 DLR 772.

—If an employee is allowed to stay on a piece of land he will (unless others along with him are also put on the same land), be in possession of such land to the exclusion of others.

New Dhamai Tea Estate Limited Vs. Arjun Kurmi (1983) 35 DLR (AD) 155.

—A Tea Company requires workers for the purpose of plantation. It is natural that for ensuring the continuity of service by such workers they should be provided with certain amenities in addition to their salary.

Amenities by way of providing housing accommodation not to be construed as creating a lease. *Ibid.*

—Distinction between these two— Lease consists of a transfer in immovable property for consideration and during its subsistence the tenant (i.e. lessee) has exclusive right of possession of the property leased—Lessee's right in relation to the property leased is a right in rem—License is merely a competence or permission to do something which except for this permission will be unlawful—No right in rem passes to the licensee. *Ibid.*

Leave

Leave of absence from office cannot be claimed as a matter of right.

S.M. Faruque Vs. Prov. of East Bengal (1958) 10 DLR 562.

Legal adviser

Duty towards clients asking advice—Obligation to make full disclosure of information in his possession relevant—Failure of obligation—Liability to damages.

Assena Marikar Muhammad Fuard Vs. Alfred Richard Werasuriya (1956)8 DLR 48(PC).

—"Legal character"—Explained

In section 42 of the Specific Relief Act the expression "legal character" or "status" denotes a character or status conferred by law on an individual or a number of individuals, viewed as a unit of society and not shared by the generality of the community but only by individuals, placed in the same category of character. The character itself must be conferred by law on person viewed from the standpoint of membership of the community. It is a "status" or "character" conferred by law. It is not a creature of contract but of law. For example, a minor cannot contract into majority nor can one, who has attained majority, under law, contract him into minority.

Burmah Eastern Ltd. Vs. B. Eastern Employees Union (1966) 18 DLR 709.

—Legal necessity, proof of—in ease of alienation by widow—Lapse of time is a factor for not insisting on strict proof of legal necessity—Recitals in the deed afford good evidence.

Mahendra Kumar Vs. Akbar Molla (1977) 29 DLR 6.

—Legal payment—payment under protest.

A payment to be an effective payment must be an unconditional payment. Payment under protest is not a legal payment so as to relieve the person, making the payment, from the consequences of nonpayment. *55 CWN (DR 3)166.*

Legal Practitioners

Enrollment of—Dismissal from Government service does not operate as an absolute bar to enrollment—Order of enrollment once made can be set aside only on a subsequent fault after fresh inquiry— Order by one judge cannot be revoked by another judge or other judges.

Din Mohd. Vs. High Court West Pakistan (1957) 9 DLR (SC) 115.

—Duty towards Court in matter of adequate preparation of case—Professional misconduct. *1955 PLR (Lah) 215.*

—Legal Practitioner—right to appear.

Legal practitioner—Advocate not debarred from representing an opposite party, if no confidential information passed to him from the other party.

If no retainer fee received by Advocate from 1st party and no confidential information passed to him then the Advocate is not debarred to accept the brief on behalf of the opposite party and appear in court on his behalf.

Syed Azizuddin Vs. Dy. Collector & DSC (1969) 21 DLR (WP) 242.

'Leges posteriores priores contrarias abrogant'.

When two provisions concerning the same subject-matter are inconsistent or contradictory with each other, then according to the maxim *leges po sicriorespriores contrarias abrogant* the latter will prevail and the doctrine of implied repeal should be brought in and that only if that course is inevitable on the language of the statute.

Jibendra Kishore Vs. Prov. of East Pakistan (1956)8 DLR 457(493).

Legislature's power

Validity of legislation cannot be challenged upon general principles of equity and justice unless it violates constitutional provisions.

Messrs. Haider Automobile Ltd. Vs. Pakistan, (1970) 22 DLR (SC) 65.

Lessee and lessor

Implies a relationship of tenant and landlord.

A lessee is, in its ordinary acceptation, no other than a tenant and the lessor, the landlord, and when such terms have been given any statutory definitions in any enactment they have not departed from such meanings.

M.H. Khandker, Advocate Vs. Bangladesh (1978) 30 DLR (SC) 1.

—Lessor, lessee and sub-lessee.

Possession of the sub-lessee, not adverse to the lessor, the landlord.

Kader has entered into possession of the suit property through the instrumentality of the bharatia Subul. Possession of bharatia was not adverse to the owner landlord Upendra.

Satyendra Chandra Banik Vs. Mawlada. Akhtar Bewa (1982) 34 DLR 300.

Letter of credit.

A foreign exporter or supplier of goods normally requires to be assured of receiving payment of the goods. He may or may not know the person seeking to purchase the goods. It is, therefore, the normal practice that in order to strengthen the credit of the purchaser the banker usually intervenes and adds to that credit his own and, assured by the credit of the banker, the foreign exporter usually, in assurance of the credit, ships the goods and draws bills of exchange which are negotiated at that place through that banker and thus payment is made to the foreign exporter.

Letters of credit are normally described as documentary letters of credit. In other words, it is a conditional letter of credit conditioned by the attachment of the documents mentioned therein. A letter of credit of this type is such a document or order by one banker in one place, authorizing some other banker, acting as his agent or correspondent in another place, to honor the drafts or cheques of a person named

in the document, up to the amount stated in the letter and charge the total amount of the drafts so honored or payments so made to the grantor of the letter of credit.

For this facility provided for the advancement t. international trade and commerce, bankers usually take certain precautions in order to secure themselves against the normal risks. The precaution usually is to lake, by way of collateral security, the goods being imported and the documents relating to the goods, so that, in the event of the purchaser failing to honor the bills, the banker can recover the amount by the sale of the goods.

S.M. Hanif Vs. Central Bank of India (1960) 12 DLR 10.

License

"To license"—meaning explained.

In its specific sense "to license" means to confer on a person the right to do something which otherwise he would not have legal power to do. A license is in the nature of a special privilege rather than a right common to all, and is often required as a condition precedent to the right to carry on business or to hold certain classes of property within the jurisdiction.

Small Town Committee Vs. Firm Md. Sadiq Barkat (1960) 12 DLR (SC) 296.

Licensee

Although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant nevertheless, he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into license merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.

Dhamai Tea Co. Ltd. Vs. Arjun Kurmi (1979) 31 DLR 432.

—Licensee's claim to stay on another's land. Occupation of another's land without any legal basis and merely on the basis of preferring claim to stay on does not create a right to stay on the land as a licensee.

Karwan Bazar hawkers Vs. DIT (1975) 27 DLR 378.

—License and Tenancy

"The difference between a tenancy and a license is, that in a tenancy an interest passes in the land, whereas in a license it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant albeit only a tenant-at-will. Whereas if he had not exclusive possession he was only a licensee this test has, however, often given rise to misgivings because it may not correspond to realities The test of exclusive possession is by no means decisive".

Dhamai Tea Co Ltd. Vs. Arjun Kurmi (1979) 31 DLR 432.

—Licensor and licensee.

"Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the divisive consideration is the intention of the parties." *Ibid.*

Lien.

A lien is a right which only arises by operation of law and is a right merely to retain possession of things already in possession.

Kazi Abdul Ali Vs. Nurul Amin (1955) 7 DLR 406.

—Lien or charge—not in favor of the purchaser but of the vendor—No deed of transfer is effectuated.

In the case of a lien or charge not in favor of the purchaser but in favor of the vendor the document does not partake the character of a sale.

Where a document provides for a lien on the property for the unpaid consideration money it is a provision in the agreement against any such contract to the contrary in the sale-deed to be executed hereafter and the possession of the property was made subject to such lien. It does not and cannot make the document a coveryance.

E.H. Chowdhury Vs. Member, Board of Revenue (1960) 12 DLR 466.

Limited interest

Limited interest.—may be acquired by prescriptive right.

Hazari Sardar Vs. Mozam Molla (1956) 8 DLR 640.

—Transferee (not recognized by the landlord) fl from the original tenant remaining in possession for over 12 years acquired a limited interest of a tenant by adverse possession.

On acquisition of a limited interest by a tenant, the landlord's right both for re-entry as well to sue the original tenant for rent is barred.

Naba Chandra Bangshi Vs. Naba Kumar Bangshi (1960) 12 DLR 552.

'Lis'

'Lis' implies conception of an issue joined between two parties. The decision of us in the ordinary use of the legal language is the decision of that issue.

Dhakeswari Cotton Mills Vs. Convnr. of Narayanganj Municipality (1955) 7 DLR 618.

Dhakeswari Cotton Mills Vs. Convnr. of Narayanganj Municipality (1968) 7 DLR 618.

'Living' wage'.

A minimum wage is the irreducible amount considered necessary for the sustenance of a worker and his family and for the preservation of his efficiency while the living wage is the ideal which enables the workman to provide for himself and his family a measure of comfort also. Fair wage is between these limits and while for a minimum wage employer's capacity to pay is not a relevant consideration, it is so in the case of the fair wage.

Dalmia Cement Co. Vs. Dalmia Cement Factory Workers Union (1958) 10 DLR (SC) 157 (162 1-h.col)

Local Authority

Vested and Non-Resident Property Cell not a 'local authority'--One appointed as a tahsilder in the Cell is not a public servant.

Keramat Ali Talukdar Vs. Election Tribunal. (1979) 31 DLR 1.

—The East Pakistan Industrial Development Corporation is a 'local authority' as well as a 'person' within the meaning of these expressions in Article 98(2), and as such amendable to the jurisdiction of the High Court.

Rostom Ali Vs. Chairman and Secretary (EPIDC) (1964) 16 DLR 651.

—What it means—National Bank of Pakistan does not fall within the definition of "local authority."

The expression "local authority" in Article 98 (2) of the Constitution means an authority which is entrusted with the administration of a local fund. Local authorities are bodies exercising within limited territories included in a Province, power which belong to the Province but which by statute are delegated to the local authority. A local authority is ordinarily charged with functions of self-government and has power of making bye-laws, of imposing taxation, and of maintaining and administering a local fund.

The National Bank of Pakistan which was set up by a Central Ordinance, bears no resemblance to the recognized conception of a 'local authority.

Deputy M. Director, N. Bank Vs. Ataul Haq (1965) 17 DLR (SC) 74.

Local investigation (inspection)

The messengers, deputed to view the land in dispute and report, examined also witnesses. The parties were present during the investigation and the plaintiff not only co-operated with the messengers in their activities but refrained from objection or complaint of any kind when their report was submitted to the court. The plaintiff contended that the messengers had gone beyond their province by examining witnesses instead of confining themselves to a scrutiny of the locus and the results

witnesses instead of confining themselves to a scrutiny of the locus and the results of their own observation and that this vitiated the judgment founded upon their report:

Held: The judgment was not vitiated.

Nkwanatahane—Nana Vs. Bchemhene Nana (1950) 2 DLR 201 (PC).

Loss of market

Loss of market due to longer voyage through breach of contract—owner of goods entitled to damage for loss of market.

In the case of marketable commodities being carried to market, if the ship greatly exceeds the larger estimate of the voyage through breach of contract and the cargo owner thereby misses the market, he is entitled to damages for loss of market.

Al-Sayer Navigation Vs. Delta International Traders. (1982) 34 DLR (AD) 111.

"Lost grant—Doctrine of—The doctrine of lost grant can have no application to the case of a right of way exercisable by the inhabitants of a village from time to Lime as such right is not attached to any estate in land nor is it capable of being made subject of a grant as there are no known grantees. The legal basis of such right lies in custom.

Asia Khatun Vs. Sufia Banu (1955) 7 DLR 71.

Limitation—Ignorance about the date of an order affecting a person, limitation runs from the date of knowledge.

Where a litigant is kept in the dark about the date of his case, it is wrong to say that for a remedial action against it as provided by law, time would start to run against him from the date of the order and not from the date when he comes to know about it.

If the order was not known to the party concerned then its date for purpose of limitation should be taken to be the date on which the party concerned came to know of it, and the period of limitation should be computed from that date (Qaderuddin Ahmed, J.).

Allahdino Vs. Fakir Mohammad, (1969) 21 DLR (SC) 382.

Maladministration and high handedness.

It is also singularly unfortunate that a responsible officer like the Sub-Divisional Officer should have passed the impugned order without applying his mind and without affording the petitioners an opportunity of being heard in the matter.

It is a glaring example of extreme high handedness on the part of responsible public officials who it appears acted in utter disregard of the law they were duty bound to obey.

Such high-handedness if overlooked and allowed to go unchecked might undermine the confidence of the citizens in the administration and bring a slur on the fair name of the Government. It is a case where we feel the Government may consider instituting a departmental enquiry and take exemplary action against the delinquent officials in the interest of justice and fair play.

Bakul Rani Sen Gupta Vs. Bangladesh (1979) 31 DLR 343.

Malafide.

Malafide is to be alleged with particularity— Assertion of general notice not sufficient for providing malafide.

Lt. Col. Farzond Ali Vs. Province of West Pakistan. (1970) 22 DLR (SC) 203.

—Malafide charge against Government not sustainable even though what it does is hard on a person and its order looks ugly.

Tofazzal Hossain Vs. Province of East Pak. (1967)19 DLR 529.

Malice

—Government order refusing permission to go abroad attacked as malaise on grounds: (a) similar orders were also passed previously but some such orders were later withdrawn; (b) petitioner was detained under preventive laws and his organization was banned; and (c) while he was under detention, his passport was confiscated.

Held: Action of authorities does not indicate malafides—Fact that previous orders were subsequently withdrawn merely proves that authorities were all the time critical and watchful in his case.

Syed Abul A'ala Moududi Vs. The Stare Bank of Pakistan (1970) 22 DLR (WP) 59.

Malice in common acceptation means ill-wilt against a person, but in its legal sense it means wrongful act, done intentionally, without just cause. The allegations made by the appellant clearly constitute "malice in law'. Malice in law means a doing of a wrongful act intentionally without just cause or excuse. If from any indirect notice the action was taken in total disregard of the judgment in Writ Petition No. 571 of 1979, the respondents must be deemed to have acted maliciously.

"Between malice in fact and malice in law there is a broad distinction. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind. Malice in fact is quite a different thing; it means an actual malicious intention on the part of the person who has done the wrongful act".

Dr. Nurul Islam Vs. Bangladesh. (1981) 33 DLR (AD) 201.

—Malice in law—Action on a legally extraneous or obviously misconceived ground of

action is a case of "malice in law".

Dr. Nurul Islam Vs. Bangladesh. (1981) 33 DLR (AD) 201.

'Malikana'

'Malikana' is an allowance which is paid as compensation for giving up the proprietary right in lieu of which the proprietor ceases to have connection with the land and, therefore, although income, is not derived from the land.

Mahendra Nath Bagchi Vs. Commr. Agricultural Income Tax. (1950) 2 DLR 20.

Manufacture—What it means.

Manufacture means the change in the character of goods or materials used, so that new goods or materials come into existence. Even where the dominant work is to repair and in the process some minor or inconsequential manufacture of a thing is done, the business does not become a manufacturing one.

Ramjan Ali Vs. Hedayetullah. (1979) 31 DLR(AD). 183.

'Marfatdar'.

Acceptance of rent through marfatdar,—no recognition of transfer of a tenancy.

Naba Chandra Bangshi Vs. Nanda Kumar Bangshi (1960) 12 DLR 552.

Marginal note of a section

Side note, although it forms no part of the section, is of some assistance in interpreting the section inasmuch as it shows the drift of the section. The question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the legislature.

Kalipada Saha Vs. State (1959) 11 DLR 231.

Maritime lien

No proof that the ship's owner or master had committed any tort or they are responsible for damage to the goods; hence there is no maritime lien.

In the instant case there was no proof that the owner had committed any tort or the master of the vessel was responsible for damage to the property, namely, the loaded salt, nor has it been contended that our municipal law has granted a maritime lien for delay and deviation.

Al-Sayer Navigation Co. Vs. Delta International Traders Ltd. (1982) 34 DLR (AD) 111.

'**Market**'—Rents and profits out of a market are benefits arising out of the land and, therefore, come within the definition of immovable property under section 2, clause 5 of the General Clauses Act and can be treated separately from the land itself and can be a subject-matter of separate lease and mortgage independently of the land on which it sits.

Profulla Kumar Sarkar Vs. Kshemada Kinker Roy (1952) 4 DLR 215.

—Market as an immovable property means the benefit that arises Out of the, land in the shape of rents and profits derived from the market itself though the market sits on the land. *Ibid.*

Martial Law Courts

Martial Law Courts being creatures either of the Proclamation or Martial Law Regulation, have the authority to try any offence made triable by such Courts.

State Vs. Haji Joynal Abedin (1980) 32 DLR (AD) 110.

Master and servant

The general rule is that the master is answerable for the wrong of the servant or agent as is committed in the course of the service and for the master's benefit.

Sonali Bank Vs. MA Hakim (1987) 39 DLR 367.

Master entitled to terminate servant's service

By the ordinary law of master and servant, when a servant is guilty of misconduct, the master is entitled as of right to terminate his service without notice. Under the general power of master and servant the Secretary of the East Pakistan Industrial Development Corporation could dismiss those who had been transferred to the East Pakistan Industrial Development Corporation from the Pakistan Industrial Development Corporation.

Chairman, EPIDC Vs. Rustom Ali (1967) 19 DLR (SC) 106.

Master and Servant (Employer and Employee).

Employer's power to discharge his employee from service cannot be questioned—Where authority passed the order of termination of employee's service without applying its mind—Such order calls for Court's scrutiny.

In the instant case the Corporation has found rightly or wrongly the allegations against the petitioner to be serious. The order of suspension spells out the allegations, indicates the action that is proposed to be taken, namely dismissal from service by the Corporation and has also given an opportunity to the employee to explain his conduct. We do not think that this order suffers from any infirmity.

Nazir Ahmed Vs. Bangladesh Jute Industries Corporation (1979) 31 DLR 196.

—Employer's power to discharge his employee from service cannot be questioned—Where authority passed the order of termination of employee's service without applying its mind—Such order calls for Courts scrutiny. *Ibid.*

Master and servant—Relationship

The three jute mills, namely United Jute Mills Ltd., Meghna Jute Mills Ltd. and Chandpur Jute Mills Ltd. were placed under Bangladesh Jute Mills Corporation for administrative purpose—Each of three Jute Mills retained their separate entity—An employee working in United Jute Mills remained an employee of that mill even after the said Jute Mill was placed under the Bangladesh Jute Mills Corporation.

Md. Motahar Hossain Khan Vs. Bangladesh Jute Mills Corporation (1984) 36 DLR (AD) 282.

—The employee in the United Jute Mills for gross financial irregularity was dismissed after an Enquiry Committee formed at the instance of the Mill Authority found him guilty of the charge. The relationship between the mill authority and the employee is that of a master and servant—As such his dismissal cannot be held illegal by the High Court Division in exercise of its writ jurisdiction. *Ibid.*

—Whether relation which subsists between master and servant is or is not applicable in case of Private Corporation. Mandamus is the proper remedy to prevent further illegal exclusion from office in a private corporation when the right thereto is clear (English and American Law).

B.S.I. Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41-42.

Master and Servant—English Law

An order of mandamus will lie to compel the restoration of a person to an office or franchise, whether spiritual or temporal, of which he has been wrongfully dismissed, provided the office or fran-. chise is of public nature, as, for example, to the office of mayor, etc.

B.S.I. Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41-42.

Master and Servant—What it means.

In case of pure master and servant cases, which mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection? If any of these elements exist, then whatever the terminology used, even though in some aspects the relationship may be called that of master and servant, there may be essential procedural requirement to be observed, and failure to observe them may result in a dismissal being declared to be void.

B.S.I. Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41-42.

—Any law enacted by a delegated authority in regard to terms and conditions of service equally enforceable—Regulation relating to terms and conditions of service framed by a statutory body has statutory force. *Ibid.*

—A contract for exclusive personal service does not necessarily establish the relation of master and servant.

Relationship of master and servant is characterized by a contract of service express or implied, between the master and servant. A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken. Whether or not a particular contract is a contract of service is a question of fact depending upon the terms of the engagement, the method of remuneration and the power of controlling and dismissing the worker, although none of these factors is by itself conclusive. *Ibid.*

—Right founded upon a contract of service between the two is incapable of enforcement by action in court. *Ibid.*

—Where an office has got a public character, it is no longer one which comes within the category of master and servant relation. *Ibid.*

—In case of such public service when terms and conditions of service are regulated by statutory provisions, rule of master and servant does not prevail. *Ibid.*

—Office is one of public character, but is governed by contract of employment—In case of breach of any terms of contract no action for reinstatement lies. *Ibid.*

—Dismissal of an employee holding a statutory office by giving a charge—Where principle of natural justice involved. *Ibid.*

—But simple termination of service without giving a blame or stigma, even though illegal or irregular, will not attract the operation of the principle of natural justice in such a case. *Ibid.*

—Dismissal of the servant by the former— Employees of a Corporation arc subject to the rule governed by usual relationship between master and servant.

The Supreme Court of Pakistan held the ordinary law of master and servant is applicable to the servants of the Corporation who were not regulated by any statutory rules. Since the plaintiff was not entitled to any constitutional protection, his dismissal order which was passed in compliance with the principle of natural justice could not be challenged inasmuch as the law of master and servant was applicable to him. He was found guilty after proper enquiry. His master did not want to keep him in service and he was not dismissed arbitrarily.

Small Industries Corpn. Vs. Abul Hossain (1975) 27 DLR 96.

Matrimonial disputes—Difficulties of courts while considering matters arising out of — A court of law provides at the best an imperfect

instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however, impartial, can enter fully into its subtle intricacies of feeling and conduct. But when a case involving such questions arises the Court must do its best to judge

dispassionately between the parties though it may sometimes be left with a doubt whether with the imperfect means at its disposal it has achieved perfect justice.

Cecil Weldron Andrew Vs. Helen Andrew (1957) 9 DLR 682 (PC).

Maxim: *audi alteram partem*; no one shall be condemned unheard—Permission to go abroad refused without affording applicant any hearing— Refusal, held, offends against rule in maxim *audi alieram partem.*

Abul Aala Moududi Vs. Stare Bank of Pakistan (1970) 22 DLR (WP) 59.

'**May**'—Usually used in permissive sense, but may also be used in imperative sense.

It is true that ordinarily the word 'may' is used in a permissive or an enabling sense. But this is not universally true. There arc cases in which it is used in the imperative sense. In support of the proposition that when statutes authorise persons to do acts for the benefit of others or for public good or the advancement of justice, the use of the expression "may" has a compulsory force.

Commissioner of Income Tax Vs. Messrs. Surridge, (1968) 20 DLR (WP) 282.

"May" and "shall"—connotation of.

The word "may", according to its natural meaning, is a permissive or enabling word and imports discretion. But it is not always so. Where a statute directs the doing of a thing for the sake of justice or the public good, the word 'may is the same as the word "shall".

—Again the word "shall' does not necessarily imply a mandate and that it is the legislative intent that determines their real import.

Tofazzal Hossain Vs. Province of E. Pakistan (1966) 18 DLR 736.

Merger—Doctrine of

The question whether there was a merger or not depends upon the intention of the parties.

It is open to the person in whose hands the two interests unite to keep them apart or to sink the subordinate into the superior interests.

Tajemali Vs. Saijuddi Khan (1954) 6 DLR 25.

—When the immediate landlord of an occupancy holding is a proprietor or permanent tenure holder and the entire interest of the landlord and the rights in the holding became united then only merger takes place. But where the occupancy holding and the immediate Taluka right is held by the same person there cannot be any merger. In the first case, the maintenance of the two separate rights in the same person would be redundant. But in the second case the two separate rights can and must be deemed to co-exist. There could have been no merger of the raiyati interest of the defendants with the Taluka interest subsequently acquired by them.

Benoy Bhusan Saha Vs. Abdul Majid, (1968) 20 DLR 826.

Military law—a separate law.

Our military law is a system of law or jurisprudence which exists separate and apart from the law which governs our judiciary in its ordinary and general jurisdiction.

Jamil Huq Vs. Bangladesh (1982) 34 DLR (AD) 126.

'Minimum wage'

A minimum wage is the irreducible amount considered necessary for the sustenance of worker and his family and for the preservation of his efficiency.

Dalmia Cement Ltd Vs. Dalmia Cement Factory Workers Union (1958) 10 DLR (SC) 157.

Minor—Minor's right to action against his adversary with regard to transfer of property during his minority—Minor acting as a plaintiff and as well as when acting as a defendant.

No adverse interest can be claimed against a minor during his minority and it can only be claimed against such minor when he attains majority.

Abbas Sheikh Vs. Abu Hossain Sarkar (1978) 30 DLR 407.

'Minor's interest in a suit—Suit for damages by heirs of the deceased—If wife of the deceased is non-suited on technical ground, its consequence may prejudice the interest of the heirs who all are minors which a Court should not allow.

Amer Vs. Haji Ismail (1971) 23 DLR (Kar.) 1.

—Minor and lease.

The creation of a lease necessarily involves a contract. Such a contract if made by a minor, is void. A void contract is an agreement not enforceable by law. But though the contract was void, if it was followed by delivery of possession, the grantee or his assignee can maintain his possession against all except the true owner. It is not the law that because the lease is void, the grantee can be ousted by any aggressor without title.

Julfikar Joardar Vs. Abdul Kuddus Ban (1953)5 DLR 305.

"Misdescription" of the cause title.

Misdescription of the cause title, made upon amendment, should not stand in the way of the success of the application.

Abdul Malek Vs. Abdur Rahman (1967) 19 DLR 218.

Abdul Malek Vs. Abdur Rahman (1967) 19 DLR 318.

—Misdescription of party's name in a suit—where not fatal.

The general rule is that a company must sue or be sued not in the names of its agents or servants but in its own corporate name; but where, however, relief really sought is by or against the company and the error is merely one of the misdescription, the suit though nominally by or against the agent, may be treated in substance to be one by or against the company.

Haji Shaikh Afzal Hossain Vs. Bhabani Prosad Shaha (1961)13 DLR 639.

Money sale and rent sale—difference between the two—There is a well-demarcated and well-defined distancing between money sale and rent sale under the Bengal Tenancy Act or the Public Demands Recovery Act. In case of former what passes under the auction sale is right, title and interest of the judgment-debtor whereas under the latter the holding passes subject to certain protected interests and if there is encumbrances they could be avoided in terms of the Act.

Julfu Molla Vs. Noab Ali (1975) 27DLR 442.

—Auction-sale not binding on a party not impleaded in the sale proceeding and auction sale altogether a nullity—The two are different—A sale will not be binding on a party if it was a money sale and if it had the effect of rent sale, it will be binding on the party.

Faziul Huq Mondal Vs. Hatem Gasu (1976) 28 DLR 361.

Mortgage

Rule of Priority—Some of several mortgaged properties sold in auction for public dues— Mortgagee for his dues at the first step to proceed against properties not sold for public dues.

M/s. Tnpura Modern Bank Ltd. Vs. Islam Khan, (1971) 23 DLR 22.

—Mortgage and charge—Distinction.

A charge does not create any right in the property but only creates a right of payment out of the property specified. It is a *jus ad rem*, right to a right, as distinguished from a *jus in rem*, a right in respect of the thing itself. Whereas a mortgage is a transfer of an interest in immovable property, as a security for the loan, a charge is not a transfer of any interest in the property, though it is nonetheless a security for payment of the amount. The right to recover the amount in question is not itself, immovable property. The right to have possession of the properly can arise only if a specified interest is actually transferred which can be done by way of mortgage, whereas no such interest is transferred in favor of the charge- holder.

Muhammad Nawaz Khan Vs. Muhammad Amin, (1969) 21 PLD (Lahore) 622.

—When the mortgagor loses his right over the property mortgaged.

Endorsements of the mortgage-deed showing payments of interests due on the mortgage by the mortgagor do not save time if such endorsements by the mortgagor arc made after he had lost his right and interest in the mortgaged property through execution of a rent-decree by the landlord.

Madan Chand Gouthy Vs. Mohd. Nurul Huda (1979) 31 DLR 372.

Mukarrari.

The word 'kaimi' is of the same category as 'mukarrari' but its import is not exactly the same. The term 'kaimi' imports permanence of occupation, but not fixity of rent. This word is not at' all appropriate to a tenancy-at-will, nor the word usually used to create a life-interest.

Kalipada Saha Vs. Nitya Nanda Saha (1953)5 DLR 285.

"Mukti-Patra" (deed of release) confers no title.

Mukti-patra cannot confer title on any party in regard to any land unless it is supported by a registered deed of transfer. Therefore, purchase from a person who claims title to the land on the basis of a mukti-patra does not confer any title to such purchaser.

Abdul Gafur Sardar Vs. Wazedali Talukdar (1967) 19 DLR 33.

Mushaa—The doctrine of mushna has no relation to the provisions of CP Code and should not be confounded with the excitability of a decree under the Code in case when decretal land is unidentifiable.

Mozaffar Ahmed Vs. Md. Osman (1976) 28 DLR (SC) 81.

Mutation

Mutation does not confer title. So far as the legality of the mutation effected, it is sufficient to state that this is merely an executive order which cannot confer title.

SM Lutfullah Vs. Bibi Badrunnessa (1968) 20 DLR 1019.

Nadabi Patra,

Nadabi Patra being merely a deed of disclaimer disclaiming an interest in the properties transferred by an earlier sale-deed is not itself a deed of transfer and therefore no right of pre-emption can be claimed upon the registration of such a deed of nadabipatra. Simply the fact that the document was registered and ad valorem stamp fee was paid on the document that by itself cannot turn a deed of disclaimer into a deed of transfer.

Md. Arabulla Vs. Durgaprasad Tribedi (1959) 11 DLR 539.

Naksbandi paper

Naksbandi (Statement of maps) paper is not a public document within the meaning of the section 74 of the Evidence Act.

Province of Bengal Vs. Jamila Khausn Chowdhury (1952) 4 DLR 222.

Natural Justice: Question of natural justice does not arise where restriction on the product of a mill has been imposed by. the executive authority in accordance with the terms embodied in the license under which the mill products were regulated and therefore, in such a case the mill cannot insist that before imposing restriction it should be heard as a matter of right.

M/s. Biral Rice Mill Vs. The Province of East Pakistan, (1971) 23 DLR 142.

—It is well established that any order passed against a person to his detriment by a quasi-judicial body contravenes the canon of natural justice if it is passed without notice to him.

Momin Motor Co. Vs. Regional Transport Authority (1958) 10 DLR 284.

—To constitute a denial of natural justice there must be a violation of some fundamental principle of law or procedure of such importance that it would shock the conscience of the court and it would con- skier it to be a case where the substance of a fair trial had been denied.

Bharat Tewari Vs. N. Hossain, Spl. Magistrate (1958) 10 DLR 481.

—Appeal involves the right of being heard. Natural justice—no one should he condemned or deprived of the property without being heard.

Chief Commr. Karachi Vs. Mrs. Dina Sohrab (1959) 11 DLR (SC) 113.

—The principle that no man shall be deprived of his property without an opportunity of being heard is not alone limited to a judicial proceeding, but to all proceedings which may affect the person or property of a person. *Ibid.*

—Circumstances which are to be taken into account when principle of natural justice are invoked.

The principles of natural justice are not of universal application. Consideration of the nature 'of things, manner and circumstances in which it is to be done are to be taken into account in determining whether the principles of natural justice should be applied in a particular case.

Bangladesh Shilpa Rin Sangstha Vs. Chairman, 2nd Labour Court (1980) 32 DLR 265.

—The principles of natural justice that no one should be condemned unheard have been firmly rooted in our judicial system.

Md. Abdur Rasheed Vs. Govt. of Bangladesh (1978) 30 DLR 231.

—Statutory provisions when excludes application of the principle of natural justice.

Md. Sekandar Hossain Vs. Govt. of Bangladesh (1977) 29 DLR 10.

—Principles of—are observed where rights affecting persons or property are adversely affected. *Ibid.*

—What it stipulates,— Person proceeded against should be given an opportunity to state his case. *Ibid.*

—No penal action should be taken against a corporate body without first giving an opportunity to the body of being heard against the proposed action.

MR Khan Vs. Bangladesh (1975) 2 7 DLR 602.

—Principles of natural justice to be observed both in administrative as well as in judicial matter.

Md. Quamruzzaman vs. Bangladesh (1977) 29 DLR 121

—Before a person is proceeded against he should know the allegations against him and should be given an opportunity of explaining his position. *Ibid.*

Natural justice and administration of law

When a statutory provision can be read consistently with principles of natural justice the courts are bound to see that the same has been observed and complied with. *Ibid.*

—The principle of no man can be deprived of his property without having an opportunity of being head is equally applicable to a corporate body.

MR. Khan Vs: Bangladesh (1975) 27 DLR 602.

Principle of the rule that no man should be condemned unheard

No man is to be condemned unheard forms an integral part of the ultra wires rule. Observance of the rule of natural justice is an indispensable rule of practice, whenever any decision is made directly affecting a man's rights or property or character.

Abdur Rashid Vs. Government of Bangladesh (1980) 32 DLR 109.

Principles of natural justice should be observed in the conduct of domestic enquiries against employees in private autonomous bodies.

It has not been shown how the material, if any, in the records, or recalling of the witnesses would help in his defense. If the domestic enquiry was held by the enquiry officer honestly and bonafide, the non-compliance alleged would not vitiate the enquiry or its result.

Md. Loqman Vs. B.A.D.C. (1980) 32 DLR 83.

—Principles of natural justice to be complied with in an enquiry against an employee dismissed (on charges of corruption).

M.A. Hai Vs. Trading Corporation of Bangladesh, Dacca (1980) 32 DLR (AD) 46.

—Principles of natural justice are limited to giving a person an opportunity to show cause why he should be punished for the allegation brought against him. *Ibid.*

—Natural Justice—Principles—Its essential feature is, no person should be deprived of his right without a hearing before an independent authority—Its purpose-is to prevent miscarriage of justice.

B.S. Agents Vs. Bangladesh (1979) 31 DLR (AD) 272.

—An unjust decision by an administrative authority affecting the right of a person can be judicially scrutinized. *Ibid.*

—Allegation as to contravention of the principles of natural justice is subject to court's decision to find out whether such principles have been contravened. *Ibid.*

—Principles of natural justice is also applicable in respect of administrative proceeding where the authority concerned is required to act on objective determination of facts. *Ibid.*

—Principles of natural justice are to be read into even though there be no positive words to this effect in the enactment—Application seeking permission to go abroad was rejected without affording the applicant any hearing. Person concerned held, condemned unheard against principles of natural justice.

Syed Abul A'ala Maududi Vs. The State Bank of Pakistan, (1970) 22 DLR (WP) 57.

—Elected member cannot be excluded from the Managing Committee merely because police said that he was not a suitable person.

The rights of an elected member of a Managing Committee cannot be allowed to be interfered with by the executive authority upon reports obtained behind the back of the member without giving him an opportunity to show cause That will be violative of the principle of natural justice.

Serajul Islam. Vs. The Deputy Commissioner, Faridpur (1970) 22 DLR 753.

—An examinee was disqualified for adopting unfair means at examination—He submitted explanation and wished to be heard in person—The Disciplinary Committee gave him personal hearing but did neither examine the witnesses deposing against him in his presence nor allowed him to cross- examine them.

Held: Action taken against the examinee disqualifying him for three years is unlawful and of no legal effect.

Malik Abdul Majid Vs. Disciplinary Committee of the University of Punjab, (1970) 22 DLR (WP) 289.

—Rule of natural justice not confined to judicial proceedings alone but extends to all proceedings such as those which are administrative in nature.

West Pakistan Through Secretary, Food Deptt. Vs. Haji Mohammad Akbar Khan, (1971) 23 DLR (Peshawar) 1.

Necessary party and proper party

Necessary party to a suit when no effective decree can be passed in his absence—Proper party to be implcadcd in a suit, when for effectual adjudication of the matter in suit, his presence is necessary.

Bajrang Lal Agarwala Vs. Aksed Ali Shaikh (1983) 35 DLR 110.

Negotiable Instrument.

The English Common Law doctrine that a debtor should seek out his creditor and pay the amount does not apply to negotiable instrument which stands on a different footing.

Rabia Khatun Vs. Ram Kali Mahajan (1950) 2 DLR 385.

'Next below rule'.

Applicable subject to Guiding Principles"— Not applicable in case of insufficiency or unsuitability of Government servant. Government the sole judge of suitability for promotion—Court has no right to interfere except for proved mala tides.

Md. Aboo Abdulla Vs. Prov. of East Pak. (1960) 12 DLR (SC) 211.

'New plea'.

Point of law requiring any fresh investigation of facts can be raised for first lime before a court of last resort.

Gopal Das Vs. Commr. of Income Tax, East Bengal (1951)3 DLR 6.

Nim Howla.

Nim-howla (an encumbrance) does not disappear automatically on the sale of the superior interest but has to be annulled by instituting a suit or by other means.

Eshaque Ali Vs. Aitunessa (1984) 36 DLR 127.

—Plaintiff not paying rent for long if that destroyed the right.

Non-payment of rent by tenant for long is not a ground to draw conclusion that thereby he has lost tide, interest and possession of the land—Munsifs observation that as the plaintiff has not paid rent for a long time he has lost title over it though not adverted to by the lower appellate Court, is not a circumstance to dismiss the 2nd appeal. *Ibid.*

Notaries Acts

Notary's acts in a reciprocating country will be recognized in Bangladesh where reciprocal arrangement exists.

Nesaruddin Vs. Khalilur Rahman (1981) 33 DLR (AD) 124.

—Notarial acts done by foreign country can be accepted in Bangladesh provided the person before whom the notarial act was done was notary public and the State authorized him to do the notarial act. *Ibid.*

"Notice"—Notice served if invalid, no obligation for the party receiving it to protest against it

It was contended that in view of the fact that the plaintiff did not lodge any protest on receipt of the notice served upon him, he must be presumed to have surrendered the tenancy by implication.

Where the notices were invalid the party receiving the same had no obligation to protest against the same. Again even if that were necessary, he may be said to have done so by the institution of the present suit.

Abdul Karim vs. Kazi Moulvi Md. Taru Mia (1966) 18 DLR 561.

Notification

Notification, its date—Notification—Date of publication, not the date of its printing but on the day when it is communicated to the public.

Province of East Pakistan Vs. Major Nawab Khawaja Hassan Askary (1970) 22 DLR

(SC) 425.

Novation of contract.

There being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract.

In the circumstances of the present case, there is no novation of contract inasmuch as there is no substitution of a new contract for the old one.

Noor Ahmad Vs. Md. Shafi (1970) 22 DLR (WP) 40.

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WORDS AND PHRASES [O, P]

Words and Phrases

Oath-taking

Oath of allegiance to the Government—When no time limit imposed as to such oath taking, an employee who is ready to take such oath cannot be treated as having lost that right.

Chairman, Bangladesh Rly. Board, Chittagong Vs. Chairman, Second Labour Court, Dacca (1979) 31 DLR 338.

Obiter of the Privy Council

When the Privy Council interprets a section or lays down a principle of law High Court is bound to follow the interpretation or principle, whether it is obiter or not.

Satya Sudhir Ghosal Vs. Surendra Lal Dey Pal (1954) 6 DLR 497.

—Obiter of the Supreme Court

Any observation by the Supreme Court even obiter is binding on the High Court.

M. Ismail and Sons Vs. Trans Oceanic Steamship Co. Ltd. (1965) 17 DLR 269

M. Ismail and Sons Vs. Trans Oceanic Steamship Co. Ltd. (1966) 17 DLR 209.

"Occupation" occurring in section 3(I) explained.

Government requisitioned petitioner's building which was under completion and which the petitioner claimed to have been constructed for his residential purpose. On the date of requisition the petitioner was not found residing in the building as it was incomplete in respect of some minor works. As against the requisition order the petitioner moved the 1-11gb Court in its writ jurisdiction in which the question arose for decision was—Whether the building in dispute which at the time of its requisition was under completion, can, for purposes of section 3(1) of the Act be said to have been occupied by its owner or not?

The Division Bench of the High Court which heard the case differed on the point and their observations were as follows:

In the face of clear provision in the Act "that no owner in occupation of a residential house shall be required to vacate it" it cannot be accepted that an owner who constructs premises for his personal residence but has not yet taken up dwelling therein due to construction being incomplete is not entitled to protection under the fourth proviso to section 3(1) of the West Pakistan Requisition of Immovable Property Act.

S.A. Mahmood, J. Contra: The Act is intended to afford protection against requisition of a residential house in the occupation of the owner bat there is no such protection respecting a house which is not occupied by the owner.

Mrs. Nema Vs. W.P. Chief Secretary, (1970) 22 DLR (WP) 9.

'Octroi' and 'tax'—meaning explained

"Octroi" as defined in the Rules "means a tax on the import of goods or animal for consumption, use or sale within a Municipality." The word "tax" has been explained in section 3(52) of the Municipal Administration Ordinance to "include any tax, toll, rate, fee or other import livable under this ordinance.'

Zaminur Rahman Vs. Bangladesh (1979) 31 DLR (AD) 171.

—Octroi is not a tax but is in the nature of toll or fee—The definition of Oct.roi as given in the Rules show that though it is described as a tax it is nothing but a toll or fee which is imposed on the importation of goods within Municipal area either for sale, use or consumption within the Municipality. The dictionary meaning also indicates that octroi is in the nature of a toll. Octroi, therefore is not a tax but is in the nature of toll or fee.

B.S. Agents Vs. Bangladesh (1979) 31 DLR (AD) 272.

'**On demand'**—A promissory note is payable 'on demand' does not imply that a demand must be made. 'On demand only means that a note is payable immediately or at sight.

Rafia Khatun Vs. Rain Kali Mahajan (1950) 2 DLR 385 (395) 1.h.col).

Onus

Onus or burden of proof as a determining factor cannot arise in case where proof has been concluded and found on a consideration of the evidence.

Najmul Huq Faraji Vs. Panchanan Poddar (1969)21 DLR 78.

Onus of proof

Initial onus of proving that the cargo carried under the bill of lading was delivered at the port of destination in damaged condition, is on the consignee (owner of the goods)—The onus thereafter shifts on to the carrier first to prove that he took all reasonable care while the cargo was in his custody and then to prove that the cargo. was damaged under circumstances beyond his control, which exonerates him from the liability of such damage under the provisions of the Act.

Muhammadi Steamship Co. Ltd. Vs. Province of East Pakistan (1970) 22 DLR 596.

—Affirmative assertion in the plaint—Plaintiff to prove his cases. The law is that the person who pleads in the affirmative of the issues is to prove the same.

Gopal Chandra Mondol Vs. Lashmat Dasi (1982) 34 DLR 145.

—Fraud, collusion, undue influence. Where alleged—the onus is on the party who alleged it as such. There is a presumption of good faith in human transaction as there is a presumption of innocence in criminal matters.

Kiron Chandra Das Vs. Sirajul Hoque Patwari (1982)34 DLR 225.

—When not relevant—When both sides adduce evidence the question of onus loses its importance and the court has to weigh the evidence on record and come to a decision on the basis of preponderance of evidence.

Jainuddin Howlader & ors. Vs. Nabab Ali Mollah & ors. (1982) 34 DLR 274.

—When evidence on both sides are fully read and digested—It is well-settled that when the evidence on both sides has been fully read and digested before reaching the conclusion, the question of error in placing the initial onus on one side or the other is not of real importance.

Badrul Haq Khan Vs. The Election Tribunal (1963) 15 DLR (SC) 389.

Ordinance

Ordinance being itself of temporary nature cannot repeal a permanent Act.

Sargodha Bhera Bus Service Vs. Prov. of West Pakistan (1959) 11 DLR (SC) 285

'Other Source'—Income from

An income shall only be chargeable to tax under the head "other sources" if it does not come under any other head of income mentioned in s.6 of Income Tax Act.

C.I.T. Vs. Lackatoorah Tea Co. Ltd. (1979) 31 DLR 396.

Pakistan appeal

The definition of the expression 'Pakistan appeal' is an appeal from or in respect of any judgment decree or order of any court or tribunal (other than the Federal Court) in Pakistan.

Federation of Pakistan Vs. A. Ahmed Hussain Shah (1955) 7 DLR (FC) 279.

Paper-book—Preparation of paper-books in the High Court in accordance with the rules framed for the purpose for use in place of original records which form permanent records of the High Court.

The meticulous rules for the preparation of paper-book have been framed with the sole purpose of preparing correct and true copies of the records, which are to be used by the lawyers as well as by the Court, instead of original records, for the hearing and disposal of the appeal. It may also be noticed that the paper book is to constitute ultimately, after disposal, a part of the permanent record of the High Court which is a court of record.

The proceedings of a Court of record are called records and arc conclusive evidence of that which is recorded therein.

Maksud Ali Vs. Eskandar Ali (1976) 28 DLR (SC) 99.

Paramountcy of Municipal law vis-avis International law

If the Code of Civil Procedure of this country provided an adequate solution of the questions that are involved in these proceedings, then investigation of the relevant principles of International Law is unnecessary.

It is no disrespect to the International Law nor a violation of the dictum laid down by the Supreme Court that statutes should not be so construed as abrogating the International Law, the relevant part of the International Law called the Private International Law of a country is that part of foreign law which such country adopts for solving, within its territories, those problems in which existence of foreign elements makes it just and fair that foreign practice, concepts, legal rights or interests be recognized. The rules according to which a country accomplishes this are thus a part of its own law. Sections 84 to 87A, CPC are statutorily adopted rules of Private International Law to suit it the needs of the country.

AM Qureshi Vs. USSR, (1968) 20 DLR (WP) 207.

Pardanashin lady—Document executed by an illiterate pardanashin lady—Onus of proof—

Deed executed by an illiterate lady. Burden of the person relying on the document to prove that it was duly understood by the lady.

It is an established principle that in case of a document executed by an illiterate pardanashin lady the onus is on the party who relied on such a deed to satisfy the Court that it has been read over and explained to her, that it was understood by her and that she had independent and disinterested advice in the matter.

Mere execution, though unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension is, in itself, no real proof of a true understanding mind in the executants. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the set- 11cr and, where necessary, explained. The extent and character of the explanations required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, of the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. Fraud, duress and actual undue influence arc separate matter.

Suratunessa Bibi Vs. Md. Naimuddin Mandal (1966) 18 DLR 37.

Deed of transfer

Transferee must prove that she executed the deed after a full understanding of the nature of the transaction—The requirement that she had independent advice regarding what she was going to do will be insisted upon when the transferee is in a position of active confidence or had fiduciary relationship.

Fazal Ahmed Vs. Achima Khatun (1984)36 DLR 144.

—Onus of proof of a document executed by her.

In a case for setting aside a Kabala in which the executants is a pardanashin lady, the onus heavily lies on the person who claims interest through the disputed Kabala to prove that it was duly executed by the executants.

Tamijur Rahman Vs. Md. Altafur Rahman (1969) 21 DLR 977.

Parliament—power of, when enacting

law, The true criterion, for the purpose of ascertaining the extent of power which the constitution has given to the Parliament, is not what powers are expressly or by implication are excluded from the scope of the chapter to which alone the Parliament must have recourse if it wishes to legislate in regard to judicial power but what powers are expressly or by implication included in it.

Attorney General of the Commonwealth of Australia Vs. Queen (1958) 10 DLR 9(PC)

—Vis-a-vis, the Constitution—Parliament's authority subject to Constitution.

Parliament is the supreme legislative authority subject to the constitutional limitations set out earlier. One of the attributes of legislative supremacy is its power to pass any law on any subject, not prohibited by the Constitution both prospectively and retrospectively.

Mofijur Rahman Khan Vs. Bangladesh (1982) 34 DLR (AD) 321

—Parliament validating a law declared invalid by court—and giving retrospective operation to the law by validating it. We should concentrate here more on the question of power of Parliament to validate a law found or declared incompetent by a court of law. Parliament has the power to validate a law declared by a court illegal by removing the cause of illegality or infirmity. The basic condition of validation is that Parliament must possess the power to legislate on the subject and having the legislative competence.

Mofijur Rahman Khan Vs. Bangladesh (1982) 34 DLR LAD) 321

Parliamentary System.

Change of Parliament system to Presidential system by the introduction of the Fourth Amendment is beyond the powers of Parliament—But in view of several factors which have happened in the meanwhile the Court can not say that the enactment is violative of fundamental rights.

Hamidul Huq Chowdhury Vs. Bangladesh (1981) 33 DLR 381.

Partition—partition effected bonafide and in a legal manner cannot be disregarded only on the ground that it was reduced to writing and registered subsequently.

Premhari Barman Vs. The Commissioner of Taxation (1972) 24 DLR 198.

—Partition of the co-sharers made amicable arrangements for separate possession of the lands for convenience that would not amount to partition of the lands in question by metes and bounds in accordance with law.

Anil Kumar Datta Chowdhury Vs. Province of East Pakistan, (1971) 23 DLR 108.

—Partition deed not executed by the person lawfully authorized—Execution by de facto guardian cannot bind the minor.

The deed of partition by which a joint property was allegedly partitioned was not executed by a person lawfully authorized to represent the minor. The act of the mother representing the minor as a de facto guardian cannot be conceived to be an act authorized by law to bind the minor for all purposes.

Jasimuddin Moadal Vs. Sunila Bibi (1979) 31 DLR 367

Partition suit. Conflicting claims in respect of shares are to be determined by the

Partition suit—Conflicting claims in respect of shares are to be determined by the court tying the suit—co-sharer out of possession.

In a suit for partition it is incumbent upon the court not only to determine whether the property was joint property and liable to partition but also where there are conflicting claims to shares, for which the partition was sought, to determine each conflicting claim which is incidental to .1ie partition and necessary for deciding the issues.

A co-sharer out of possession would be in constructive possession of the property through the other co-sharer in actual possession and that would not amount to dispossession.

Partition suit may involve disputed question of title—Such questions must be decided by the court trying the suit.

Sashi Kumar Vs. Sreemati Kusum Kumarj Debi. (1982) 34 DLR 127

—After the preliminary decree is passed there can be no abatement of suit on the death of a party; heirs can be brought on record at any time.

Omed Ali Sikder Vs. Arman Sikder (1979) 31 DLR (AD) 320.

—Decree obtained by plaintiff and the two defendants in a suit for specific performance of contract—the decree was not executed—Partition suit would lie for separation of plaintiff's share.

Three persons (the plaintiff and the 2 defendants) obtained a joint decree for specific performance of contract, the decree was not however executed. Dispute arose between the parties as to extent of shares which each party has in the land with respect to which they got the decree for specific performances of contract. Plaintiff instituted the suit (before the decree for specific performance of contract was executed) for partition in respect of the said land held jointly by the plaintiff and the 2 defendants and met with the defense that a partition suit before the decree was actually executed, his right not having been converted into a legal title, was not maintainable.

Held: Partition Suit will lie in such circumstances, the plaintiff having a legal right, is entitled to the remedy sought by way of partition.

D. Mohammad Hossain Vs. Abdul Malek Khan (1980) 32 DLR (AD) 24.

—For partition Suit the party must have community of interests and need not have a legal right in respect of the property. *Ibid.*

—Points at issue in a partition suit between the parties making contending claims to be determined by the court.

Mere denial of the title of the plaintiff does not convert a suit for partition into a suit for possession. There night be numerous defendants in a suit for partition and they might not all be agreed as to the title and possession of the plaintiff. The court in this view would have to hold a preliminary investigation of the properties as to which the title of the plaintiff was admitted or established. The court would also have to determine the properties of which the plaintiff was in possession.

A Court if a partition suit would be competent to decide a question of title for the purpose of settling the issues in the suit and a mere denial of a plaintiff's right would not convert a partition suit into a declaratory suit for title and possession.

Sashi Kumar Vs. Kusum Kumari Debi (1982) 34 DLR 128.

—Question of title involved in such suit— Strangers having title in the subject matter of title suit, and having no community interest.

The Courts in our country refused to decide complicated questions of title in a suit for partition. However, questions of title came to be entertained when determination of such questions was found to be incidental to the partition and could not be avoided in a case where it was deemed just to direct a partition. Again, because of the requirement of presence of community of interest amongst the parties to a suit for partition a stranger could not be impleaded even when his presence was found necessary for doing full and complete justice to the parties in one action. Widely prevalent practice of benami transaction in our country caused great hardship to a plaintiff who sought partition and separate possession with regard to some joint property or joint family property standing in the name of a stranger, but was pushed to a troublesome and time-consuming title suit.

The Court Fees (Bengal Amendment) Act, 1935 (Bengal Act VII of 1935) for the first time introduced two specific provisions for suits for partition by incorporating paragraphs VI, VIA, in section 7, for the plaintiff who has been excluded from possession and entry No. VA in Article 17 of Schedule II to the Court Fees Act 1870, for the plaintiff who is in possession of the property. The procedural phrase "to enforce a right to a share in any property", on the ground that it is "joint family property or joint property', in both the provisions, has, no doubt been meant to provide for adjudication of title in respect of any joint family property or joint property standing in the name of others including strangers. A plea of defendant that as he entirely stands on his independent right and that he has no community of interest with the parties to the suit he can not be drawn into suit for partition will not affect the suit if it satisfies the basic requirements of a suit for partition.

Abdul Majid Howladar Vs. Hakimonnessa Bibi (1979) 31 DLR 217.

Partnership—"Refusal to meet on matters of business, continued quarrelling and a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation are sufficient to justify a dissolution.

Rahimuddin Vs. Bengal Water Ways (1979) 31 DLR 29.

Pasturage right—Claimed on the basis of customary right.

When a plaintiff sets up a prescriptive right he cannot be allowed to succeed on the basis of customary right. An easement right of pasturage cannot be acquired by an indefinite number of people of a certain village or villages on the basis of a lost grant or by prescription under section 26 of the Urination Act, but such a right can be ac4uircd by custom when all the requisites of a valid custom are established.

A custom by which right of pasturage by long user is claimed by villagers to lands in a neighboring village, and belonging to different landlords, which results in precluding the land from being brought under cultivation, is unreasonable and is not legally enforceable.

legally enforceable.

Barindra Ch. Das Vs. Mvi. Mahbubul Quader (1955) 7 DLR 464.

—A iight of pasturage by Customs can only be claimed on the basis of a customary right and the ordinary incidents of a customary right attached to it, including the manner and method of its proof and that even if after such proof the custom is found to have been established, it must still be shown that it is not unreasonable before it can be treated as a valid custom.

Intej Ali and Intejulla Vs. Yadulla. (1960) 12 DLR 573.

Pay, arrears of

Arrears of pay (salary) due to a public servant is not a matter which comes within the purview of 'public duty. Mandamus cannot be issued to enforce payment of salary to a public servant.

Pakistan Vs. Mahrajuddsn (1959)11 DLR (SC) 260.

—Pay Commission's recommendation must be notified in official gazette to create a legal right.

Manager. Azizuddin Industries Ltd. Vs. Abdus Satter (1979) 31 DLR 58.

Penalty—Categories of

When there are categories of penalty—minor penalty, and major penalties and there are as many as four types of minor penalties, the question of imposition of punishment becomes relevant for consideration as to the application of mind of the authority concerned.

Bangladesh represented by the Secretary, Ministry of Public Works Vs. Md. Matiur Rahman (1982) 34 DLR (AD) 285.

Pension and gratuity—not heritable property.

Gratuity as well as pension constitute a bounty and not a heritable property. According to Civil Services Rule if an officer dies before actually retiring or being discharged, his heirs have no claim to anything in respect of his pension. Right to the officer himself to a pension is not enforceable in a civil court. This is clear from section 4 of the Pension Act, 1871. Pensions— Commuted pensions heritable.

Govt. of Pakistan Vs. Begum Justice Soofi (1959) 11 DLR (SC) 247.

'Periphery'—"within the periphery of the hat"—Meaning of this expression in the context of the present case.

The learned Judges of the High Court Division, after hearing the parties, held that the disputed plots of land having fallen within the periphery of hat and bazar were within the boundary line of the hat and bazar. Referring in the word periphery' the learned judges observed that it meant circumference of any closed figure.

Md. Deser Ali Vs. Bangladesh (1982) 34 DLR (AD) 103.

—The word "person" within the meaning of the sub-rule(2) of rule 1 Or. 40, CPC means a person other than a party and as such does not put any bar upon the Court to appoint a receiver and remove the defendant from possession.

Serajul Islam Vs. Bimal Chandra Sen (1982) 34 DLR 297.

—'Person' and 'individual'.

Person means an individual plus something more, viz, any company or association or body of individuals incorporated or not. Person denotes a larger category than the word "individual" and 'individual' is definitely included in the definition of the word 'person', but it cannot be said vice-versa.

The term person denotes a single person as distinguished form a group or class and very commonly refers to a private or natural person as distinguished from a partnership, corporation or association of individuals.

Chittagong Jute Manufacturing Co. Ltd. Vs. Mohara Union Council, (1970) 22 DLR 247.

—University of Dacca is a 'person' and is amenable to the jurisdiction of the High Court under Article 98 of the Constitution of 1962.

University of Dacca Vs. Zakir Ahmed (1964) 16 DLR (SC) 722.

'Persona designata

In legal phraseology the expression "persona designata" means a person described in the statute by his official designation, and the function may be judicial or otherwise. If the function is a judicial function, then he is a Court, though he is described not as a Court but by official designation.

Mil Das vs. Mustaque Ahmed (1966)18 DLR 87.

—In legal phraseology the expression 'persona designata' means a perston described in the statute or legal instrument by his official designation or as a member of a class. A function may be given to a person describing him by his official designation and the functions may be judicial or otherwise. If the function is a judicial function, then he is a Court, though he is described not as a court but by official designation.

Afsaruddin Bhuiya Vs. Wazed Ali Khan (1952) 4 DLR 442.

—The expression District Judge connotes court of District Judge and does not refer to him as a persona designata.

Azizul Haq Vs. S.M. Hanif Ltd. (1955) 7 DLR 287.

—It appears that where a judge or the presiding officer of a court itself is directed to perform any function of an authority, created by a statute, such a judge may be considered as a persona designata and not a court.

It is thus clear that a non-official or even an official may be appointed as a persona designata to perform a certain function which may in some respects be judicial but he does not thereby become a civil court.

Golam Ahmad Vs. Md. MA Karim (1957) 9 DLR 382 (386 1.h.col)

—The expression 'persona designata' means a person described in the statute or legal instrument by his official designation or as a member of a class.

Amir Sultan Ali Hyder Vs. Md. K. Alam (1977) 29 DLR (SC) 295.

—Persona designasa and court—Persona designata may be a court if his function is judicial.

Chera Dangi Mela Vs. Md Yusuf Ali (1978) 30 DLR (SC) 310.

Personal decree

Personal decree—In a mortgage suit nothing remains to be done after the passing of a personal decree.

Ramani Kanta Lahiri Chowdhury Vs. Brajendra Kishore Roy Choudhury (1956)8 DLR 609.

Pith and substance. In order to determine whether a particular enactment entrenches upon a field which is excluded from its ambit the rule is well-settled that the court must ascertain the pith and substance of the enactment scrutinizing it in its entirety so' that it may be known what it effects and not what it may indirectly affect. If upon such examination it is found that it in substance effects what it can effect then the fact that even though in doing so it also indirectly or incidentally affects something which it could not effect the enactment should be held to be *intra vires*.

Jagadish Chandra Mazumdar Vs. Commr. of Agricultural Income Tax (1956) 8 DLR 327.

—The expression 'pith and substance' is familiarly applied to the examination of statutes in point of their competency i.e., in a Federal Constitution, for the purpose of determining whether a statute relates to one subject or to another subject. It is unusual to employ this expression when construing the scope and content of

unusual to employ this expression when construing the scope and content of constitutional provision.

Abdul Aziz Vs. Prov. of Wes Pakistan (1959) ii DLR (SC) 126.

Plaint"—$hall contain statement of facts and on such facts can rely for deducing legal effect for the case.

Abandonment of right which arises from statement of facts in the plaint cannot be inferred merely from the circumstances that the plaint contains other (alternative) statement of facts to lead to other conclusions.

Budhu Vs. Ghulam Shah (1963) 15 DLR (SC) 315.

—Variation of a case in the plaint—Not illegal when it does not cause any prejudice to the other party—But one cause of action cannot substitute another cause of action. *Ibid.*

—Alternative cases can be set up but not inconsistent case—Instances of alternative cases. *Ibid.*

'**Pleader Commissioner**—Appointment or removal of—High Court is the final authority— District Judge is only a recommending authority.

Abdal Majid Vs. District Judge, Mymensingh (1977) 29 DLR 1.

"Pleadings" Rule of pleading—Insistence on compliance with all technicalities without regard to the substance of the matter would defeat justice.

S.M. Ayub Vs. Syed Yusuf Shah (1967) 19 DLR (SC) 382.

Pledge or Pawn and Mortgage

Pledge or pawn of some property—Mortgage of some property—Difference between the pledge and mortgage—-in case of the former, ownership of the pledged or pawned property remains with the pledgor—In the case. of mortgage, ownership partly passes to the mortgagee.

Md. Obaidul Akbar Vs. E.P. Co-operative Bank (1975) 27 DLR 523.

Police Service—All the members in the Police Service have been described as "Declined Force" in the Constitution.

Bangladesh Vs. A.K.M. Jahangir Hossain (1982) 34 DLR 'AD) 173.

—Police force belongs to a different classification, though a component of" disciplined force".

Police force, though comes within the ambit of 'disciplined forces and does constitute the component of disciplined force yet it has been assigned with a different classification in the 'disciplined force' separate and distinct from the army, navy or air force. *Ibid.*

Possession—Symbolical—Symbolical possession is as good as actual possession against judgment-debtor. Symbolical is as good as actual possession against a judgment-debtor, and its principle of law was finally sealed as far back as in 1917 by the Judicial Committee of the Privy Council in a case reported in 23 CWN 37.

Amulya Chandra Kundu Vs. Monendra Nath Biswas (1979) 31 DLR 74.

Possession and trespass

If two persons arc in possession of a piece of land, one having title and the other not, .then the one who has title is in possession in the eye of law and the other is a mere intruder. Possession in fact is not always possession in law; nor it is necessary that possession in order to be possession in law, must be possession in fact.

Sadeq Ali Shaikh Vs. Fayzuddin Ahmed (1954) 6 DLR 253.

—Persons already in peaceful possession of land in assertion of title is entitled to recover possession of the same from a trespasser who dispossessed him, although the title of the person possessing the land had not yet become perfect.

Although the defendants were not parties to the documents and the Suits still the peaceful possession of the Dastidars and after that of the plaintiffs' (in succession to the Dastidars) being earlier and peaceful such possession could not have been disturbed by the defendants who are mere trespassers. The plaintiffs are, therefore, entitled to a decree in respect of the entire disputed plot No.7 although paramount title deed does not cover the whole of that plot.

Mahabulla Vs. Abdul Aziz (1968) 20 DLR 324.

Power of Attorney—Authority under

If a transaction is entered into by a stranger with a person holding a general power of attorney authorizing him to sign letters and other papers on behalf of a bank, it shall be presumed that he is entering the contract in the ordinary course of business with full authority on their behalf and such contracts will be binding on his principal. *PLR (1960)1 WP 658.*

—Must be construed strictly—Agent can neither go beyond nor deviate from terms of power of attorney—Attorney authorized only to manage principal's property and to obtain loan on behalf of principal on security of principal's property—Such authority, held, cannot be extended so as to enable attorney to mortgage property of principal for loan obtained by third party.

Eagle Star Insurance Co. Ltd. Vs. Usman Sons Ltd., (1969) 21 PLD (Karachi) 124.

—Whether a power of attorney executed in India and authenticated by a Magistrate in India and not authenticated by any authorized officer of Diplomatic Mission of the then Pakistan in Calcutta is a valid document in Bangladesh which could be acted upon.

A power of attorney executed as required by the Registration Act confers power of the attorney to act.

A power of attorney executed in terms of Registration Act or under other provisions of law which confers a valid power on the attorney to act as an agent for the principal does not require registration except that its authentication under the law is necessary.

Nurunnessa Vs. Babar Ali Bepari (1981) 33 DLR (AD) 124.

"Preamble"—its scope

The context of the preamble cannot either enlarge or abridge the meaning of the enacting parts in absence of any ambiguity therein. *Province of East Pakistan Vs. Sirajul Huq (1967) 19 DLR (SC) 281.*

—Preambles have been regarded as of great importance as guides to construction because they set out the facts or state of the law for which it is proposed to legislate by the statute. In other words, the preamble is a useful guide as to the scope and meaning of the different provisions in the statute.

Pasharuddin Ahmed Vs. Jolekha Khatun (1953) 5 DLR 527.

Precedents

A decision is to be read with reference to the facts and circumstances of the case and not independently of them.

Abdul Gani Talukdar Vs. Rushan (1960) 12 DLR 40.

—If two decisions are inconsistent, the court can choose which to follow.

Wahed Ali Mia Vs. Haji Abdul Wahed (1954) 6 DLR 206 (209 l-h.col).

—The decisions of Indian Republic are not binding on the courts in Pakistan, but that should not prevent the latter from referring to the legal principles enunciated by the former.

A.K.R. Ahmed Vs. Govt. of East Bengal (1951) 3 DLR 50.

—Every case has to be read with the fact of that case and every document is to be read with reference to the particular wording of the same.

Enayet Hossain Chowdhury Vs. Member, Board of Revenue, E. Pak. (1960)12 DLR 466.

—Even though the decisions of the Calcutta High Court arc no longer binding on the High Court of East Pakistan, yet those decisions were given in respect of laws which then applied and still do apply to this part of the country. They have established a basis for the regulation of rights, liabilities and interests in these parts over a large number of years and this High Court would be reluctant to bring in a new order and make a sudden change in the interpretation of that law applying to this part of the country.

Kala Gazi Vs. Abdul Ghafur Bhuiya (1960) 12 DLR 345.

—Their binding force (case-law of superior courts—its binding effect).

A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

Shahidullah Kazi Vs. A.D.C., (1968) 20 DLR 633.

Pre-constitutional law—In conflict with the Constitution. If a pre-constitutional law comes into conflict with any Fundamental Rights it is void from that time.

The position is different in the case of law which is pre-constitutional, that is, a law which was promulgated when there was no constitutional prohibition as provided in Article 6(2).

Ful Chand Das Vs. Mohammad Hammad (1982) 34 DLR (AD) 364.

Prejudiced

An examinee was disqualified for adopting unfair means at examination—He submitted explanation and wished to be heard in person—The Disciplinary Committee gave him personal hearing but did neither examine the witnesses deposing against him in his presence nor allowed him to cross-examine them.

Held: Action taken against the examine disqualifying him for three years is unlawful and of no legal effect.
Mulik Abdul Majid Vs. Disciplinary Committee of the University of Punjab, (1970) 12 DLR (WP) 289.

"Prejudicial act"—Explained in relation to a public speech

To determine whether the speech was in itself an incitement to haired and contempt for the Government established by law, it is important first to regard it as a whole, to determine its scope and content, and the direction into which it was designed to guide the minds and actions of the audience.

The law .would, however, not begin to apply unless the words used were in themselves of a character such that they would bring about in the minds of the

themselves of a character such that they would bring about in the minds of the audience a strong revulsion of feeling against the established Government, so that a state of active contempt for it would arise, coupled with such aversion as is accompanied ordinarily with a desire to injure or destroy the object of the aversion.

The particular reference to the existence of power of detention without trial was not irrelevant to the speech, and to mention the fact, in an evocation to the audience to strive in a united manner for the grant of fundamental rights, was apposite.

Province of East Pakistan Vs. Tofazzal Hossain (1965) 17 DLR (SC) 453.

Preliminary and final decree—The proceedings in a partition suit subsists till passing of the final decree. By the preliminary decree only disputed question of title, if any, and extent of share of the parties along with the question of possession, are determined.

Omed Ali Sikder Vs. Arman Sikder (1979) 31 DLR (AD) 320.

Premises

The word 'premises', what it means

—The word 'premises' includes not only a building or hut but also grounds, among other things.

Abdul Mutaleb Vs. Musammat Rezia Bgum. (1970) 22 DLR (SC) 134.

Presumption—Possession goes with title.

If the evidence of possession on behalf of the plaintiffs and on behalf of the defendants as to the former's possession within 12 years before suit is evenly balanced the presumption that possession goes with title shall prevail; where the evidence adduced by both the parties, although unsatisfactory, is not altogether valueless, the court is entitled to take into consideration the presumption that possession arises from title.

Md. Hossain Mia Vs. Shujayatullah (1984) 36 DLR 191.

Who died first—Presumption

Male and female both killed by a mob— Presumption is male member was killed first.

In case of a dispute about inheritance the question arose as to which person, male and female, who were both killed by a rioting mob, was killed first.

Held: In a general massacre, man would prefer to be killed first, and would avoid the ugly spectacle of his own womenfolk being slaughtered right before his eyes. On the other hand, the mob would also naturally be interested to finish men folk first. It can, therefore, legitimately be presumed that men folk must have been annihilated first before the turn of the womenfolk came.

Abdul Muqim Vs. Settlement and Rehabilitation Commissioner, (1969) 21 DLR (WP)

201.

—Presumption as to document's date of execution— There is a general presumption as to the correctness of the date the document bears which is by no means conclusive. Such presumption loses it force when evidence is adduced by both sides.

Md. Jafar Ali Vs. Md. Abdul Majid (1967) 19 DLR 40.

Principal and Agent

The tie between the principal and agent being non-existent, any party stepping into the shoes of the agent cannot revive the relationship.

It has been contended that since, as a matter of fact, it is the Government of Bangladesh who want to prosecute the suit, the application of provisions of section 83 of the Code do not arise. This submission of the learned Advocate would have carried much weight had it not been a fact that the Government of Bangladesh by virtue of the provisions of the President's Order took over only the management including assets of the agent and not the management and property of the principal. That makes the real difference. Bangladesh I.W.T. Corporation by stepping into he shoes of the Agent cannot claim to have the same relationship with the principal; this submission of the learned Advocate cannot also be accepted.

The United Oriental Steamship Co. Ltd. being a Pakistani-based company, is barred from bringing action in any Court of Bangladesh. However, the consistent view is that in such a situation it is not proper to dismiss the suit but to stay the same till such time when the plaintiff is in a position to prosecute the suit or make necessary arrangements for prosecution of the suit.

United Oriental Steamship Co., Karachi Vs. Starbac Co., Naviera, (1973) 25 DLR 114.

—Where the tie between the principal and agent is non-existent, any party stepping into the shoes of the agent cannot revive the relationship. *Ibid.*

Principle of Natural Justice

Once a license is granted and it is sought to be cancelled on a charge which amounts to the determination of a guilt, the principle of Natural Justice is attracted and a show cause notice becomes necessary.

Haji Sharafatullah Vs. Deputy Commissioner, Dinajpur (1970) 22 DLR 242.

Private International Law

Recourse to the provisions of Private International Law for realization of decretal dues being expensive and time-consuming provisions of Or. 18, r. 5 can be availed of.

Bangladesh Vs. Unamarayen S.A. Panama (1977) 29 DLR 252.

Prize Court's decisions.

"Proper Officer of the Govt.": meaning of, Proper Officer or the Solicitor does not represent the Government according to the Original Side Rules— cannot therefore file an appeal in such capacity against the decision of the Prize Court.

Govt. of Bangladesh Vs. M.R. Khan (1976) 28 DLR 215.

Prize Court money.

It cannot be held that the Government can deal with the Prize Court, money as it deems fit, excepting in the manner referred to in the judgment of High Court Division.

Bangladesh represented by the Secretary, Ministry of Law Vs. Hon'ble Judge, Prize Court (1982) 34 DLR (AD) 213.

Prize Fund

Prize Fund could only be distributed or invested in accordance with rules under Or. 34 of the Prize Court Rules.

The Prize Fund belongs to the State to be kept in the custody of the Prize Court and the Fund can only be disposed of by a judicial order to the Prize Court upon an appropriate proceeding.

Govt. of Bangladesh Vs. Judge, Prize Court. (1980) 32 DLR 194.

"Probationer's confirmation".

Service—Government

Confirmation of probationers. in the discretion of the employer. Probationers remain as such till appointed to a permanent post—Nor can he claim, when permanently appointed, to be confirmed from the date of the original appointment as probationer though, in usual course, confirmation takes place from the date of original appointment. Confirmation is also dependent upon various circumstances.

Muhd. Naseem Ahmad Vs. Miss Azra Feroz Bakht (1968) 20 DLR (SC) 79

Procedure, law of.

Law of Procedure takes effect prospectively. *Manmatho Nath Poddar Vs. Tripura State Bank (1959) 11 DLR 204*

—Compliance with the rules of—Imperative.

Enactments regulating procedure in courts are imperative, and not merely directory. If, for instance, an appeal from a decision be given with provisions requiring the fulfillment of certain conditions such as giving notice of appeal and entering into recognizance's, or transmitting documents within a certain time, a strict compliance

recognizances, or transmitting documents within a certain time, a strict compliance would be imperative and non-compliance would be fatal to the appeal.

Mohammad Hakim Meah Vs. Mafizullah Dhupi (1959) 11 DLR 438.

Procedural law Retrospective operation of—Where retrospectively affects a person adversely, a courts should be chary of giving retrospective effect. It must be pointed out that if in this process any existing rights are affected or the giving of retrospective operation causes inconvenience or injustice then the courts will not, even in the case of a procedural statute, favor an interpretation giving retrospective effect to the statute. On the other hand, if the new procedure is of such a character that its retrospective application will tend to promote justice without any consequcnt4II embarrassment or detriment to any of the parties concerned, the courts would favorably incline towards giving effect to such procedural statutes retrospectively.

Regulation 3(2) if given retrospective operation then at once it will deprive the accused from right of an appeal which was provided for by the *Special Powers Act.*

Haji Joynal Abedin Vs. State (1978) 30 DLR 374

Proclamation

Bangladesh was placed on Martial Law on 15.8.75 by Mr. Khondker Mostaque Ahmed under Proclamation of 20.8.75—He made over Presidentship to Mr. Justice Sayem, on 6.11.75 who became the Chief Martial Law Administrator on 8.11.75.

Sultan Ahmed Vs. Election Commissioner (1978) 30 DLR 292.

—Major General Ziaur Rahman was appointed Chief Martial Law Administrator on 29.11.76 by the Third Proclamation. *Ibid.*

—Major General Ziaur Rahman succeeds President Sayem after latter's resignation on 12th April, 1977—Constitution not abrogated but made subject to Martial Law. *Ibid.*

—Proclamation of 20-8-75—Its provisions under clauses (d) and (e). Clauses (d) & (e) of the Proclamation dated 20.8.75 which are relevant in this case are quoted below

(d) This Proclamation and the Martial Law Regulations and Orders and other Orders made by mc in pursuance thereof shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force.

(e) The Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders and other Orders made by me in pursuance thereof, continue to remain in force. *Ibid.*

—Relevant parts of para (3) of the Preamble of the Proclamation is dated 20.9.75 and clause (I) of the Proclamation is dated 8.11.75. *Ibid.*

Proclamation and Martial Law— B y Proclamation of 20.8.75 Court's jurisdiction to call in question Proclamation and Martial Law Regulations taken away. *Ibid.*

—Martial law is the supreme law of the land. Constitution subordinate to it. Its

—Martial law is the supreme law of the land— Constitution subordinate to it—its validity can not be questioned by courts. *Ibid.*

—The Appellate Division's observation in the case of CP No. 17 1/1977 is to The following effect:

"The validity of such legislation which may take the form of either a Proclamation or Regulation or Order cannot be challenged as invalid in ay Court of law including the Supreme Court. Mr. Khondker Mostaque Ahmed, who became the President of Bangladesh, assumed full powers of the Govt. and by clauses (d) & (e) of the Proclamation made the Constitution of Bangladesh which was allowed to remain in force, subordinate to the Proclamation and any Regulation or Order as may be made by the President in pursuance thereof.., under the Proclamation.....the Constitution has lost its character as the Supreme Law of the country'. *Ibid.*

Martial Law—Notification of the Chief Election Commissioner—Articles 43, 51, 119 and 123 of the Constitution were suspended and would remain so till 3rd June, 1978. *Ibid.*

Proclamation 1 Clause (e)—"Any other orders", mean all orders whether made in exercise of executive or legislative powers. *Ibid.*

Martial Law—Sovereign authority of the State now lies in the hands of the Chief Martial Law Administrator. *Ibid.*

Proclamation

President Khondker Mostaque did not enter into the office of President on 15.8.75. He took over all powers of the Govt. in a manner not contemplated by the Constitution—Source of power of Proclamation and so long it remains in force election to the Presidentship will be controlled by it.

Fixation of time for holding election to the office of President is a matter of political expediency.

The Constitution's position as at present is very precarious.

The Constitution has not been killed nor has it been allowed to live with full force of its life; it is subordinate to the Proclamation. Martial Law Regulations and Orders or even any other Order made under the Proclamation.

Sultan Ahmed Vs. Election Commr. (1978) 30 DLR 291.

Proclamation of Martial Law—On 20th August, 1975. Clauses (b) (i) & (iv) : President's power to set up Special Court and Tribunal by Martial Law Regulations.

Haji Joynal Abedin Vs. State (1978) 30 DLR 371.

Regulation 3(2) of 1975.

Govt. is authorized to liar for cases from one M.L. Court to another such Court r from Criminal Court or Special Tribunal to M.L. court—It has not specified the case or class of cases that may be so transferred—M.L. Court is not vested with any kind of special jurisdiction—Its jurisdiction with the normal criminal courts is concurrent. Transfer of a case from a Tribunal exercising special jurisdiction to an M.L. Court not having any special jurisdiction is unlawful. Regulation 3(2) of 1975 provides.

"Government may transfer a case from one Martial Law Court to another Martial Law Court or from a Criminal Court or Special Tribunal to Martial Law Court'

Haji Joynal Abedin Vs. State (1978)30 DLR 371:

Professional misconduct

"Professional misconduct' is fraudulent or grossly improper conduct in the discharge of professional duties. Two elements arc disclosed as necessary ingredients of the offence. Firstly, the conduct must be in the discharge of professional duties. Secondly, it must be a conduct involving moral turpitude.

What is necessary to find is something of a gross or evil nature without which no conclusion of professional misconduct can be reached. Conduct which is consistent with the rules and traditions which govern the conduct of Advocates and Barristers and even the commission of a grave irregularity are insufficient to constitute a 'professional misconduct. Per Cornelius 3., (Majority agreeing with him).

Ch. Sardar All Vs. Honb'le Judges of Lahore high Court (1956) 8 DLR (SC) 140.

—Per Munir CJ. (Disagreeing from the majority view): Disciplinary proceedings may be taken against an advocate if in the opinion of the court he has been guilty of some misconduct which has a bearing on the question whether he is a fit person to continue to be an officer of the court, the misconduct need not be attributable to him while he was acting as an advocate. The degree of the misconduct may influence the court considering whether proceedings should or should not be started against him as well as in determining the amount of punishment but misconduct being proved it does not at all affect the court's jurisdiction to express its disapproval of that conduct.

Ch. Sardar Ali Vs. Honb'le Judges of Lahore high Court (1956) 8 DLR (SC) 140.

Proforma: The perform means as a matter of form. A proforma-opposite party is only a formal opposite party as opposed to a real opposite party.

Malik Md. Qasim Vs. Mian Md. Nuruzzaman, (1970) 22 DLR 204.

Promissory note—Explained

A promissory note is defined in section 4 of the Negotiable Instruments Act as an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker, to pay on demand or at a fixed determinable future time a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. It should be noticed that there is no mention of consideration in the definition and in that it differs from the definition of

an agreement under the Contract Act. The maker or a holder of negotiable instrument, e.g. a promissory note, may endorse it by signing the same otherwise than as such maker, for the purpose of negotiation. He is thereupon called the 'endorser'.

Ismail Vs. Fida Ally (1965) 17 DLR (SC) 531.

—Suit for recovery of money due on promissory note insufficiently stamped, must fail, but if the plaint discloses that there was an agreement by the loanee to pay the money received, the plaintiff is entitled to fall back upon that agreement even though the Suit not maintainable on promissory note: Independent contract made out in the plaint may be accepted when the case on promissory note fails.

If the suit is based on an inadmissible promissory note, it cannot form the basis of a claim. No decree can be obtained on the promissory note itself, it in a case where plaintiff is able to prove an independent contract in respect of the same transaction, there is no reason why he cannot do so.

If the plaintiff had founded an alternative case in the same plaint, there is no dissent from the proposition that he can do so.

It will be found on a perusal of the plaint that the plaintiff has based his case on the promise of repayment and on the defendant receiving the aforesaid sum of money. Further the plaintiff's case is that the promissory note was a collateral security to safeguard the payment of the money.

Even if the promissory note cannot be the basis of plaintiff's claim, there is no reason why he would not be allowed to prove the alternative case which he had made out, namely, a breach of an undertaking given by the defendant to return back the money which he had received from the plaintiff.

Haji Abdus Samad Vs. Fakir Mia (1966)18 DLR 569.

—Surety's liability—A surety is liable to the assignee of a promissory note. On the assignment of a debt to a thud person all the right, attached to it including the guarantee are acquired by the assignee who can file a suit against the surety. The assignment of a debt does not amount to a variation of a contract and does not absolve the surety of his liability to pay of debt. *PLR (1960) 1 (WI') 544.*

—A promissory note payable on demand does not imply that a demand must be made and the words 'on demand only mean that a note is payable immediately or at sight.

A promissory note that is payable on demand or at sight is governed Art, 73 of the Limitation Act and time runs from the date of the execution of the instrument and under section 64 of the Negotiable Instrument Act where note is payable on demand, no presentation is necessary.

Rabia Khatun Vs. Ram Kali Mahajan (1950) 2 DLR 385.

Promotion

Petitioner promoted to the higher grade over 5 years ago—Such promotion cannot be assailed on the ground of mistake.

Since the petitioner got a vested right to the post of Office Superintendent it cannot be assailed after 5 years on the ground of mistake committed by somebody else. The impugned order has certainly reduced the petitioner in rank and as such it is violative of the Corporation's Service Regulation.

Kazi Ali Noor Vs. Secretary, Ministry of Agriculture (1979) 31 DLR 427.

—Promotions to the higher post—are made on seniority basis. It will be seen from the Notification incorporated in the Establishment Manual that the prerequisites for promotion from the Sub-divisional Adjutant of Ansars to the District Adjutant of Ansars was that one should have 5 years of service as Sub- divisional Adjutant of Ansars. It transpires from the records that the promotions to the higher posts are made on the basis of seniority in service. The petitioner being senior in service in having joined the post of Sub-divisional Adjutant of Ansars earlier than the other respondents it could not he said that the promotion of the said respondents were in accordance with law.

S. Monwarul Wadud Vs. Md. Zahirul Hoque (1982) 34 DLR 241.

—Promotion to the higher post— Condition for promotion. The Corporation case is that due to mistake committed by their officers the earlier promotion of the present petitioner was given but the earlier promotion is not found to have been barred by any statute or rule. Promotion was governed by senioritycum-efficiency. That the petitioner was efficient is not disputed. So, on the ground that there were some persons senior to him, his promotion cannot be assailed after 5 years. As to requirement of at least 2 years service for the post of Head Assistant for qualifying the petitioner to be promoted to the post of the Office Superintendent, this requirement is not statutory but it is the requirement of promotion procedure which is quite different from the Service Regulation made under the East Pakistan Agricultural Development Corporation Ordinance 1961. This requirement might be relaxed in appropriate cases.

Kazi Ali Noor Vs. Secretary. Ministry of Agricultare (1979) 31 DLR 427.

—Promotion—rule of seniority, cum fitness—can be changed by Government to one depending upon result of departmental examination— Government entitled to make such rules.

Central Board of Revenue Pak. Vs. Asad Ahmed Khan (1960) 12 DLR (SC) 221.

Promoted officer.

Seniority of directly recruited officer as against a 'promoted officer—Determinable with reference to date of commencement of officiating of the former.

Bashir Ahmed Khan Vs. Mahmud Ali Khan Chowdhury (1960)12 DLR (SC) 94

Proof of facts by affidavit—Counter- affidavit in denial of the fact stated in the affidavit— Effect.

It is open to a Court on sufficient grounds to permit a fact to be proved by an affidavit. Affidavit filed along with an application can be used as evidence of facts alleged therein and it cannot be rejected merely because there has been a verbal denial of the allegations by the opposite party.

Admission of affidavit in proof of facts is subject to the proviso that in case the opposite party controverts the allegations by filing a counter affidavit or demands the attendance of the deponent for his cross examination, the party relying on the affidavit must produce him in the witness box and if the respondent fails to submit to the cross examination, the affidavit shall lose all its force and cannot be acted upon.

Abdul Hamid Vs. Malik Karam Dad PCS Election Tribunal, Rawalpindi (1966) 18 DLR (WP) 3.

Proviso—How to construe it

The effect of a proviso is to except something enacted therein which but for the proviso, would be within it. The natural presumption is that but for the proviso, the enacting part of the section would have included in it the subject-matter of the proviso. In principle also the words of a proviso are to be construed strictly; and confined to the special case which its words enact. It would be wrong to construe those words as being co-extensive with those words used in purview, particularly where the effect might be of bringing about a repeal of the purview.

East West Steamship Ca. Vs. Pakistan (1958) 10 DLR (SC) 52.

'Public agencies'

The words 'public agencies' make it clear that the doctrine of immunity has no application to private individuals or their properties.

Master Amiruzzaman Vs. Crown (1953) 5 DLR 323.

—Even in de sphere of public agencies, whether the principle applies, there is a growing opinion shared by most of the countries and the business world that the principle of the immunity should not extend to public vessels engaged in commercial undertakings. *Ibid.*

Public corporation may be of various types

Public corporations set up by the State again may assume various forms. It may choose to set up a corporation under the Companies Act either contributing entire share capital by the Government or dividing the contribution of share capital between the Government and the public. It may set up a corporation by a statute. This statutory corporation again is sometimes made amenable to different provisions of the Companies Act subject to the statute and sometimes it is kept totally outside the ambit of operation of the Companies Act, governable wholly by the incorporating statute itself. A public corpora- lion may function as a government department or its agent or both or may be totally independent of either having its down independent corporate personality.

B.S.I. Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41.

—Industries in private sector—Masters of their own house—Govt. exercises limited control. *Ibid.*

—National corporations are public service corporations and not a department of the State. *Ibid.*

—Public corporation set up by State different from private corporations set up under the *Companies Act. Ibid.*

Public Corporation—Its formation and functions—Entity of Government companies and statutory corporations distinct and separate from the Government and their employees are not regarded as civil servants. *Ibid.*

Public enterprise—Forms in which States have established public enterprises are mainly of three types: (1) Departmental administration; (2) the joint stock company controlled completely or partly by public authority ; and finally (3) the public corporation proper, as a distinct type of corporation different from the private law company. *Ibid.*

Public Office—Guarantee as to such office conferred by law.

The necessary ingredient of a public office appears to have been correctly stressed in a definition occurring in the Extraordinary Legal Remedies by "Ferries" at page 199 which runs as follows: "The public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties."

Munshi Abdul Jabbar Vs. Barisal Municipal Committee, (1968) 20 DLR 1186.

Public Officer

Public officer to exercise authority vested in them for the benefit of public.

Chowdhury Noor Muhammad Vs. Province of West Pakistan (1971) 23 DLR (Lahore) 22.

Public policy—When public policy requires the observance of a provision of a particular law, it can not be waived by an individual.

Dhirendra Nath Datta Roy Vs. Sudhindra Chandra Chakroborty (1959) 11 DLR 151.

—**Public policy and morality**—Public policy and morality referred to in section 23 of the Contract Act, are by their very nature, things and always an unsafe and treacherous ground for legal decision. The determination of what is or what is not contrary to public policy or morality must necessarily depend upon the merits in each case and upon the state of development of public opinion and morality of the community concerned as a whole. The courts are as such very c1utious in deciding this question and normally reluctant to invent new heads of public policy or to extend it beyond classes of cases already covered by it.

Haji Sanu Mia Vs. Musammat Al-Haj Jahanara Bagum (1956) 8 DLR 616.

—Public policy does not comprehend, as often popularly imagined, all the political policies from time to time of the Government, nor does it render void agreements merely because they tend to defeat some purpose ascribed to the law which is neither apparent nor necessarily implied in the language of the enactment. *Ibid.*

Public purpose—When a requisition order cannot be supported in law not being one for a public purpose, the difference that the order was made for an individual or for a private limited company is of no significance.

Razab Ali Vs. Prov. of East Pakistan (1958)10 DLR 489.

—In each case the court will have to consider on the facts whether the purpose is a public purpose or not. It is, therefore, not proper nor desirable to lay down any definition of 'public purpose'.

The phrase 'public purpose' must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.

Sarat Kumar Kanungoe Vs. Prov. of East Pakistan (1958) 10 DLR 393.

—Accommodation acquired for the residence of Government servants is as much for Government purposes as acquisition for the location of Government offices.

Pakistan Vs. Muhammad Ali (1960) 12 DLR (SC) 58.

—Public purpose of charitable nature—The word 'charitable' includes the advancement of public utility. *1955 PLR (Lak.) 509.*

—'Public purpose'—How it is to be interpreted and viewed—The Privy Council in Pettit's case repelled the contention that there cannot be a public purpose in taking land, if that land when taken, is not in some way or other made available to the public at large.

Bangladesh Vs. Winfred Rubi (1982) 34 DLR (AD) 162.

—Co-operative-housing society—Acquisition of land for profiteering purpose—Not public purpose.

Md. Ismail Vs. Bangladesh (1982) 34 DLR 4.

Public servant—Public Servants— Seniority—Determination—violation of

fundamental principles—appropriate case for writ.

Salamat Ali Jafri Vs. Prov. of West Pakistan (1956) 8 DLR (WPC) 72.

—Arrear of pay—suit for, by public servant against the State not maintainable—only remedy for, the public servant is an appeal of an official or political kind.

Pakistan Vs. Mehrajuddin (1959) 11 DLR (SC) 260.

—Arrears of pay due to a public servant is not a mailer which comes within the purview of 'public duty'; mandamus cannot be issued to enforce payment of salary due to a public servant. *Ibid.*

—Service liable to be terminated by one month's notice—No action taken after inquiry on charges but services terminated by one month's notice—Termination not necessarily mala fide. *(1956) PLR (Lah) 1920.*

—Dereliction of duty by public servants in the discharge of their duty with inevitable consequence. It was indeed unfortunate that with full knowledge of the injunction order these responsible government officers should have violated it and taken the law in their own hands.

K.M. Morshed Vs. Executive Engineer (1976) 28 DLR 450.

Public Service

Determination of seniority—Seniority in the grade is to be determined from the date of appointment to the grade, confirmation takes place in order of that seniority, subject, of course, to the rule of efficiency and fitness.

Munshi Muhammad Vs. General Manager, (1970) 22 DLR (SC) 331.

Purchase and Sale—In the absence of a statutory provision of land such words as 'sale' and 'purchase' arc frequently used in connection with transactions by which the transfer of ownership in land takes place in the absence of the element of mutual assent.

Rasu Taito Nalukuya Vs. Director of Lands (1959) 11 DLR 81 (PC).

"Purported exercise'

When an act is manifestly without jurisdiction that act cannot be protected on the basis of the expression "purported exercised in the validating clause of 5th Amendment of the Constitution.

It is true mala fide act is also not protected but then malafide is to be pleaded with particulars constituting such mala fide and established by cogent materials before the Court.

Nasiruddin Vs. Government of Bangladesh (1980)32 DLR (AD) 216.

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WORDS AND PHRASES [Q - S]

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Subject: Words and Phrase

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Words and Phrases

Quasi-judicial Tribunal

Quasi-judicial Tribunal—No personal knowledge to be imported into the proceedings.

Quasi-judicial Tribunals who deal with the rights and obligations of parties should not, under any circumstance, import their personal knowledge into a decision given by them.

Yar Ali Khan Chowdhury Vs. Administrator of Wakfs (1968) 20 DLR 535.

Quasi judicial—What the word 'quasi' indicates.

The word 'quasi' as prefixed to the word judicial may either indicate that the tribunal is not acting 'purely administratively' or that it is acting in a manner in which a judicial tribunal is expected to act.

Tariq Transport Co. Vs. Sargodha Bhera Bus Service (1959) 11 DLR (SC) 140.

Quasi judicial body

Order of such, is illegal if it affects a person adversely without giving a notice to him. *Momin Motor Co. Vs. Regional Transport Authority (1958) 10 DL)? 284.*

Question of fraud

Question of fraud and collusion is a question of fact. *Salema Khatun (1978) 30 DLR (SC) 99.*

Raiyat and tenant—Tenant of an agricultural holding is generally called 'raiyat' while the word 'tenant' is used in relation to lands, agricultural and nonagricultural.

M.H. Khondoker Vs. Bangladesh (1978) 30 DLR (SC) 1.

Reasonable and probable cause— of time. Malicious- prosecution.

It means a genuine belief based on reasonable grounds that the proceedings are justified. The defendant must show me reasonable care in determining whether there are sufficient grounds for the proceedings instituted by him, and any failure to exhibit such judgment or care will be imputed to him as a want of reasonable and probable cause.

Province of East Bengal Vs. S.M. Faruque (1958) 10 DL)? 601.

Reconstruction of record—Court's duty

Where one party alleges that a record of a Court has been lost the onus is on that party to prove that there was a pending proceeding before the Court, but once it is established that a record did exist it is the duty of the Court to take all steps to secure or reconstruct the record.

When a Court is unable to reconstruct a record at one stage because of the non-availability of sufficient evidence and therefore refuses to proceed with the suit, it cannot be said that the Suit henceforth stands dismissed. All that has happened is that on account of a practical but insuperable impediment the suit cannot be tried. The suit still remains, pending .

Sk. Mahboob Alam Vs. Central Exchange Bank (1960) 12 DLR (WP) 96.

Reconstruction of the Court's records.

A judicial proceeding—Reconstruction on the basis of First Appeal—Paper-Book.

it is in exercise of its inherent jurisdiction to do justice that steps are taken by a Court to reconstruct its own records on the basis of the available materials which may be lawfully taken notice of by it. Such a proceeding is a judicial proceeding and the proof of the contents of the documents which are to be reconstructed must be in conformity to the law of evidence.

The learned Judges of the High Court Division have directed the Court of the Subordinate Judge to reconstruct the required documents on the basis of the Paper Book of the First Appeal which was preferred to the High Court against the decree under execution as well as certified copies of the judgment and decree passed by the High Court in the said appeal.

Masud Ali Vs. Eskander Ali (1976) 28 DLR (SC) 99.

Reconveyance, agreement of counting

In the instant case the general expression with regard to time for payment of consideration for the reconveyance, "within 4 years," appears to be in conflict with the clearly spelt out period of time, i.e., between the 1st. Aswin 1370 B.S. to 30th Kartick 1374 B.S. The apparent conflict gets easily resolved when the two expressions as to time are construed in proper perspective.

In ascertaining the period of time the general expression is to be ignored when the beginning and the end of the questioned period of time is clearly specified and dated.

Nazera Begum Vs. Motahar Ali Mia (1982) 34 DLR 49.

Record

The word 'Record' is wider in meaning than 'decree'. "Record" is a wider term than "decree".

Record" includes judgment, decree, pleading, evidence, and exhibits but "decree" means precisely that which is defined in section 2(2) CPC. Again, "error apparent on the face of the record" is a much wider term than the words "clerical or arithmetical mistake or error apparent on the face of the decree." Whereas in Or. 47 rule 1 the application for review can be made "to the Court which passed the decree or made the order"; in Or. 47 rules 2, except on the grounds stated in the rule itself, the application for review" shall be made only to the judge who passed the decree or made the order sought to be reviewed."

Alhaj Md. Ruhul Amin Vs. Dhaha Municipal Corporation (1984) 36 DLR 1.

Record-of-right—is evidence of present possession—Registered Kabala evidence of title.

Sultanuddin Chowdhury Vs. Govt. of Bangladesh (1980) 32 DLR 252.

Record of right not a document of title

Record of right not a document of title.

Record of right is not a document of title. It does not create or extinguish title to land. At best, along with other evidence, it may support an evidence of tide. By itself, it is not an evidence of title.

Unless the plaintiff can make out his title, he cannot recover possession since the defendant is on the land.

Lal Meah, Vs. Haji Md. Ibrahim Meah (1976) 28 DLR (SC) 61.

—Latter record-of-rights will prevail over the earlier one. *Abdul Hamid Vs. Abdul Hossain Mir. (1983) 35 DLR. 293*

—Entry in the record of rights—Its weight and effect.

In a case where the plaintiff relies upon the en- try in the record of rights for the basis of his title it is not necessary for him to show the basis of his title, or the entry in the record of rights.

Meherjan Bibi, Vs. Naimuddin Dhali (1981) 33 DLR 126.

—Reformation in situ: Is incidental to the proprietary right of the person to whom the land belonged and during the period of submergence of the land the ownership is not lost but merely suspended and on its reappearance in the old site the owner gets it back.

A. Mannan Vs. Kulada Ranjan (1979) 31 DLR (AD) 197.

—When a land reappears on its old site which originally belonged to one person, he does not lose his ownership of it only because the re-appeared land joins the land which belongs to another man and the latter can not claim it as an accession to his land. *Ibid.*

—When a navigable river swallows up hard and firm soil, capable of being cultivated in the usual manner, and subsequently yields up the same in more or less the same condition of soil, it can be claimed by the original owner as reformation in situ.

Satyendra Kumar Vs. Province of East Pakistan. (1958) 10 DLR 39;8 PLR (Dac.) 495.

Refund: Refund of earnest money—Trial Court held that seller was not entitled to forfeit earnest money and yet dismissed the suit instituted by the buyer for refund of the earnest money without granting any decree for refund of earnest money.

Held: Amount of earnest money recoverable.

Messrs. Muhanvnad Amin Muhammad Bashir Ltd. Vs. Messrs. Amin Brothers Ltd. (1969) 21 DLR 238.

'Refused'.

Registered notice comes back with the remarks 'refused'. Addressee to prove that the notice was not properly addressed. *Monomohan Roy Chowdhury Vs. Ajü Kamal Datta (1954) 6 DLR 267*

—Registered notice issued to the defendant was returned with remark of the postal authority refused.

Held: This was a good notice.

Monomohan Roy Chowdhury Vs. Ajit Kamal Datta (1954) 6 DLR 267.

'Registrar of Co-operative Society acting as a Chairman of the society—.Propriety of —

The Registrar of Co-operative Societies being invested with power to exercise control over the Society and to adjudicate disputes between the Society and others, it does not seem desirable that the Registrar should function also as Chairman of the Society. The holding of both the offices of Registrar and Chairman of the Society by the same person may give rise to an embarrassing situation.

Zeaul Haq Vs. East Pakistan Co-operative Society Ltd. (1967) 19 DLR 498.

Re-imbursement to co-sharer

A co-sharer is under no obligation to re-imburse the defaulting co-sharer-purchaser by payment of the expenses properly incurred in the purchase together with the interest thereon. The purchases made by such a co-sharer-purchaser should ensure to the benefit of all the other co-sharers and the property must be regarded as being held for the benefit of all the co sharers according to their respective shares at the date of the sale. In order to perfect the title of the other co-sharers, they are bound to reconvey the property purchased free of cost.

Jamila Khatun Vs. Yasin (1959) 11 DLR 199.

Relief must follow the right claimed

It is of the very essence of judicial proceedings that the relief to be granted should follow as a legal result from the right alleged and found. The error in the proceedings is fundamental where the relief granted is different from the one prayed and flows not from the right alleged but from a right which has not been pleaded and as to which the court has never heard the parties. This is true in all proceedings but more so in proceedings for prerogative writs where the court does not generally act *ex debito justitiae* but confines the petitioner to a specific right and a specific relief.

The petitioner had asked for a writ of *mandamus* requiring the Government of Pakistan to let the respondent continue in office as Joint Secretary, National Assembly, for a further period of two years, but the writ or direction actually issued was not in accordance with this prayer and it restrained (he Government from interfering with the rights of the respondent as an employee for the remaining period

of his service. Thus, in place of a writ of mandamus, a writ of prohibition in substance was issued against

the Government, requiring it not to interfere with the rights of the respondent as an employee of the Government. Thus the High Court granted to the petitioner a relief for which there had been no argument before the High Court and accordingly the order of the High Court was set aside.

Pakistan through Secy. National Assembly Vs. Khondkar Ali Afzal (1960) 12 DLR (SC) 38.

"Remedial enactment"—defined

A "remedial enactment" is one which improves and facilitates remedy already existing for the enforcement of an existing right and for the redress of wrongs or injuries, as well as to correct defects, mistakes and omissions in a former law.

Osman Gani Vs. Mainuddin Ahmed (1975) 27 DLR (SC) 61.

'Rent-receipts' are evidence of possession, and may be used as collateral evidence of title.

Erfan Ali Vs. Joynal Abedin Mia (1983) 35 DLR (AD) 216.

Repeal—Law regarding repeal

Repeal of an earlier repealing Act—revival of the original Act if can be presumed.

The question to be answered is as to whether by such subsequent repeal of the earlier repealing Act the original Act XXXIII of 1951 stood revived or not.

Wazed Ali Vs. Mofizuddin Shah (1981) 33 DLR 418.

—Where an Act repealing, in whole or in part, a former Act is itself repealed, the last repeal dock not revive the Act or provisions before repealed, unless words be added reviving them. *Ibid.*

Reports of parliamentary commission

Reports of Parliamentary Commission and other facts within the contemplation of the Legislature when passing the Act—Judicial notice to be taken.

Govindan Sillappah Vs. Punchi Banda Mudayaka (1953)5 DLR 521 (PC).

"Require"—Explained

The word "require' involves something more than a mere wish and involves an element of need to some extent at least

element of need to some extent at least.

M/s. Bunman's Builders Vs. Land Acquisition Deputy Collector, (1962) 14 DLR 671.

'Reserve'

The word 'reserve' in Rule 2 Sch. II of the Business Profits Act has been used in its plain ordinary meaning. It has been used in a much wider sense than in the Companies Act.

According to the plain and dictionary meaning of the word 'reserve' there must be some setting apart of the amount for some special or general purpose by a person or a body authorized under the Articles of Association of the Company to allocate the funds for particular purposes.

R. Sim & Co Vs. Commr. of Income Tax East Bengal (1956) 8 DLR 208.

Retrospective effect

—Retrospective effect of the statute, applicability of statues is presumed to be applicable to cases and facts coming into existence after their enactment unless there is clear intention to give them retrospective effect.

Nabi Ahmed Vs. Home Secretary, Government of West Pakistan (1970) 22 DLR (SC) 20.

—Retrospective effect to a statute may be given either by express words or the same may be inferred from the language employed.

Income Tax Officer Vs. Sulaiman Bhai Jiwa, (1970) 22 DLR (SC) 113.

—An act which is invalid when it is done cannot be legalized by legislature giving it retrospective effect.

C.I.E. Vs. Adamjee Mill (1978) 30 DLR (SC) 284.

'Retrospective operation'—Construction of the term.

The term 'retrospective operation' is ambiguous because it is applied both to the fact that a particular enactment operates from before its date or so as to affect pre-existing rights and to the problem of construction which may be presented by an enactment as to whether it extends backwards or not.

When an enactment extends backwards, by its own clear language, it operates retrospectively. It is only when the intention of the Legislature does not lie on the surface that a question of interpretation arises and, in such a case, in deciding whether the enactment concerned is intended to operate retrospectively certain well-known principles are followed.

Commr. of Income Tax East Pak Vs. Redhashyam Agarwalla (1960) 12 DLR I (PC).

—Legislature cannot validate an invalid law where it lacks power to pass that law.

Constitution not retrospective—Fundamental rights—Validity of pre-Constitution law, when in clash with the fundamental rights under the Constitution laws, must remain unaffected unto the date the Constitution came into force.

Jibendra Kishore Acharyya Vs. Prov. of East Pakistan (1956) 8 DLR 457.

Revenue Court—Order of.

Revenue courts order holding the plaintiff to be a tenant can be challenged in civil Court in a subsequent Suit.

Karam Ali Vs. Raja (1955) 7 DLR (FC) 90.

—Not to go behind the decision of civil court.

It is not permissible for the revenue courts to go behind the decision of civil courts and re-open matter already decided by competent judicial authority. In a suit for rent whether the claim was based on a civil court decree, it was altogether wrong to enter on enquiries whether that decree had been rightly given or not.

Md. Hayat Vs. Bati & ors. (1953) 5 DLR (FC) 4.

Revenue record

With regard to the revenue records they are presumed to relate to the state of things prevailing at the date on which they are prepared. *(1956) PLR (Lah) 1909.*

Review

—Of a decision—any order passed on such review is without jurisdiction when an appeal or revision against the decision itself was pending before a superior authority and the law prohibits reviewing when an appeal or revision is pending. Question of knowledge or lack of knowledge about pendency of appeal or revision irrelevant, the bar to review being complete.

Ghulam Mohi-ud-Din Vs. C.S. Commissioner, Lahore (1964) 16 DLR (SC) 655.

—Of an order—passed in revision by an authority to which the power of revision was delegated—if permissible under law.

Majority view (per S.A. Rahman and Hamoodur Rahman, JJ.) was that such authority has no power to review its own order. The power of review in this context cannot be regarded as ancillary to the revisional power conferred on the delegatee. A power of review is a creature of the statute and it cannot be said that a delegatee exercising revisional powers under sub-section (2 of section 20 of the Displaced Persons (Compensation & Rehabilitation) Act have inherent power to review orders passed in

his capacity as a delegatee.

Mst. Zainab Khatoon Vs. Mian Ghulam Shabbir (1964) 16 DLR (SC) 712.

—Right of review can be exercised only in case of excusable failure on the part of a party to bring to the notice of court new and important matters of error.

Abu Said Md. Idris Ali Sikdar Vs. Monoranjan Bagchi (1970) 22 DLR 214.

Review and appeal—Scope of—The appellate jurisdiction is wider than its jurisdiction of review and that an erroneous view of evidence or mw is ordinarily not a good ground for review.

Mailer not raised in the original court, should not ordinarily be allowed to be raised in appeal.

Allahdino Vs. Fakir Mohammad (1969) 21 DLR (SC) 382.

Review and revision—Joint Registrar has no independent power of review—Whenever he exercises the power of review he acts as a Registrar exercising power u/s 135(2). Once the Joint Registrar exercises the power of review which is one u/s 135 (2), Registrar cannot review once again u/s 135(2).

Registrar of the Co-operative Societies took the view that application can be filed a second time under section 135(2) of the Bangladesh Co-operative Societies Act and that this section does not limit his power of review to only one occasion.

Section 135 was not amended to give this power to the Joint Registrar. This power of review and revision has been given to the Government and the Registrar. It is therefore clear that the Joint Registrar in disposing of the first application for review acted as the Registrar under section 135(2). Registrar's power of review was exhausted thereafter and he became functions officio and was left with no power to review or revise his order already made in review or revision.

Progati Khudra Babashayee Samabaya Samity Ltd. Vs. Bangladesh (1979) 31 DLR 152.

Revision petition—A revision petition may be treated as a memorandum of appeal and vice-versa.

If a petition for revision has been filed when an appeal should have been filed or vice-versa, that is not sufficient for depriving a party of a remedy which has been sought under a wrong nomenclature. The object of the petitioner was to have the impugned order examined by the High Court and the circumstance that the petition was described as a petition for revision and not as a memorandum of appeal cannot, on any reasonable ground, be considered fatal for the case of the petitioner. It is open to the High Court to treat a petition for revision as a memo of appeal and a memo of appeal as a petition for revision.

LA Collector Rawalpindi Vs. Li. Gen. Wajid Ali Khan Baki (1960) 12 DLR (WP) 10.

Right—A right to transfer a property or any interest in a property is itself a right. It is a proprietary right.

Contract—proprietary right—Right arising out of a contract to reconvey on the happening of certain event is a proprietary right—A third party when entitled to a benefit arising out of a contract.

Aftabuddin Miah Vs. Kudrat Ali Miah (1982) 34 DLR 51.

—Where there is a right though the right is short of legal title person holding such right entitled to remedy.

In a suit for specific performance of contract unless the decree is executed and the Kabala obtained no legal title vests in the decree holders. Apart, however, from legal title to-a property, there may be various species of possessory or other legal rights created on the property which can be enforced. Once there is a legal right, the remedy will be available according to the right. It could not be said that when a transferee is in possession of a property in part performance of a contract and that contract has been affirmed by a decree for specific performance, the transferee after the decree does not acquire an interest in the land. He can lawfully maintain and protect hi possession and interest in the property.

Dr. Mohd. Hossain Vs. Abdul Malek Khan (1980)32 DLR (AD) 24.

—Right to sue "means a right of obtaining from Court on adjudication of the matter in dispute—When the right to file suit is unaffected and postponed.

The Trustees of the Port of Chittagong Vs. Sadharan Bima Corporation (1980) 32 DLR 99.

—Right of an elected member cannot be abridged arbitrarily by the enactment—The member or the body must be heard before the right is taken away.

Abdur Rashid Vs. Government of Bangladesh (1980) 32 DLR 109.

—Right of way—Customary—Presumption from long and continuous user is that enjoyment was as of right, unless shown otherwise.

Akshaya Ch. Majumdar Chowdhury Vs. Haranarayan Majumdar Chowdhury (1956) 8 DLR 90.

—Where a customary right of way is set up and user for 30 years is proved; the presumption would be *prima facie* that it was as of right.

This presumption may however be destroyed by proof either of the fact that the alleged rights were enjoyed under an express or implied permission from the owner of the lands over which the burden is sought to be imposed, or by showing that enjoyment was interrupted on account of adverse interference of such a duration as supports an inevitable inference that the enjoyer acquiesced in the interruption and abandoned his right.

abandoned his right.

In a case for establishment for customary right from a long and Continuous user the Court is competent to presume that the plaintiff enjoyed the pathway as of right.

Akshaya Ch. Majumdar Chowdhury Vs. Haranarayan Majumdar Chowdhury (1956) 8 DLR 90.

—It is a well settled principle of law that in a case for establishment of custom the plaintiff must prove the following items : (I) ancient (ii) continuous (iii) peaceable (iv) reasonable (v) certain and compulsory.

Akshaya Ch. Majumdar Chowdhury Vs. Haranarayan Majumdar Chowdhury (1956)8 DLR 90.

—Right of fishery not a profit arising out of the soil—Right of fishery in a navigable river cannot be acquired under East Bengal State Acquisition and Tenancy Act.

Right of fishery in a navigable river is not an encumbrance within the meaning of section 2(10) of the Act.

Md. Tazammal Hossain Vs. Prov. of East Pakistan (I95)j II DLR 145.

'**Right of being heard'—**Appeal—involves the right of being heard. Natural justice that no one should be condemned or deprived of the property without being heard.

Chief Commr. Karachi Vs. Mrs. Din Sohrab Kairaic (1959) 11 DIR (SC) 113.

—The principle that no man shall be deprived of his property without an opportunity of being heard is not alone limited to a judicial proceeding, but extends to all proceedings which may affect the person or property of a person. *Ibid.*

—Rights and obligations of the parties in a suit—determination of—Rights and obligations of the parties in a suit as a rule are determined as they are on the date the suit is filed unless the Legislature provides otherwise.

Krishnaranjan Chowdhury Vs. Hem Chandra Das Chowdhury (1957) 9 DLR 159.

Rules of Business of the Government (Central)

Non-observance of the procedure laid down by the Rules and Instructions, if not provided with penal consequence provided they are faithfully, honestly and substantially followed (even though not technically and strictly) will not annul the actions and proceedings of the Government.

Messrs Nabi Baksk & Sons Vs. Pakistan, (1970) 22 DLR (WP) 99.

Rules—Rules can only be framed in accordance with the statutory authority. *Aminul*

Islam Vs. Bangladesh Biman Corporasion.(1982) 34 DLR 63.

—Rules cannot be called in aid to defeat the clear intention of the Legislature *United Industrial Bank Vs. Mohonbashi Sahs. (1959) 11 DLR (SC) 369.*

—Framed by a non-legislative body cannot affect the provisions of law enacted by a Legislatress.

Mansur Ali Vs. Member Board of Revenue E. Pak. (1959) 11 DIR 412.

Rules and forms—Rules and forms under the authority of an Act can be referred to for the purpose of interpretation of the Act.

Aryyasihan Insurance Co. Vs. Nurul Islam Chowdhury. (1958) 10 DLR 510.

Rules of Indian States—Not sovereign princes in true sense and privileges under the International Law not applicable to them.

Jagadish Ch. Mazumdar Vs. Commr. Agriculture Income Tax E. Bengal (1956)8 DIR 327.

—Rules of Indian States enjoying sovereign status are not immune from the law enacted by Indian Legislature. *Ibid.*

Rule of law—Anything done, if done without any lawful authority, is wholly illegal.

A body formed by an executive fiat which adopted a resolution for uniting two independent colleges into one having no legal basis the resolution adopted is without any valid authority and illegal.

MA Samad Vs. Sub-Divisional Officer (1977)29 DLR 198.

'Sajjadanashin', the term explained— Succession to the office of Sajjadanashin is regulated by custom. One recognized mode is, murids appoint the successor to office after death of the former.

Md. Matlabur Rahman Vs. Madan Meah Chowdhury (1981) 33 DLR (AD) 286.

'Salami'

Where settlement of lands were not for any fixed terms, salamis paid to the assesses by the cultivating raiyats fall within the scope of income assessable to income-tax under the Bengal Agricultural Income Tax-Act.

Mahendra Nath Bagchi Vs. Commr. Of Agricultural Income Tax, E. Bengal (1950)2 DLR 209.

—Salami is directly derived from the land compensation for the use of it.

Salami is agricultural income in cases where leases are for relatively small areas of lands for purpose of cultivation for periods which are fixed. *Ibid.*

"Salary"

The definition of the word "salary" will include a servant who is on leave without pay, for a period of time as also a servant who is under suspension for a contingent period, receiving lesser payment without doing any work. The aforesaid classes persons are both "in service" and in the habit of "salary" as an incident to their service.

A person, who is under suspension in respect a Government service, is not in a different position from a servant, who is on leave without pay.

The expression "salary" is co-related to term "service" or being in 'service' and postulates habit or a recurring procedure. The expression "in also connotes a continual or habitual process, notwithstanding casual interruptions.

This definition will, however, exclude a person receiving a "pension" as he is no longer "in service".

Mukhlesur Rahman Vs. SDO, Narayanganj (1962) 14DLR 762.

—Arrears pay—An-ears pay can be claimed from local bodies but from the date when administration of a particular institution (in the present case schools of Sylhet district) is taken over by Government, such claim is not sustainable.

Chairman, Local Board, Habiganj, Sylhet Vs. Md. Nurul Islam Tarapdar (1967)19 DLR 207.

Sale

When transaction is made by more than one document, all such documents should be read together and the cumulative effect should be taken into consideration—If the intention is for 6ut and Out sale, the transaction should be so considered.

Habibur Rahman Vs. Md. Mansur (1970) 22 DLR 505.

Sale certificate—By sale a property is transmitted from one person to another, and the sale certificate is a certificate to show that such a trans mission has taken place. It may be merely an evidence of title or may be called a deed of title, in the sense that it shows that the holder of it is the owner of what previously belonged to another. It is not a deed of title in the sense that it shows the creation of a new right.

Kalipada Saha Vs. Nitya Nanda Saha (1953) 5 DLR 285 (287 1-h.col).

—The sale certificate may be a deed of title; but the kabuliyat which created the lease

—The sale certificate may be a deed of title; but the kabuliyat which created the lease is the basic deed of tide and inspite of the sale, the terms as to rent, duration and other matters will be regulated by the kabuliyat by which it was created. The kabuliyat is not an antecedent document but constitutes the very essence of the title. *Ibid.*

Salus Populi Supreme Lex.

Governor-General's right to take action on the plea of *salus populi supreme lex* or from the doctrine of necessity.

Reference by H.E. The Governor General (1955) 7 DLR (FC) 395(399).

'Same Business'

Question arose whether the freight earning business as well as the jute brokerage business constitutes the "same business' within the meaning of section 24(2) of the Income-tax Act.

Held: As the vessel has, in fact, been used for carrying goods of others ii is clearly a separate business.

M/s. Ludlow Pakistan Co. Ltd. Dacca Vs. The Commissioner of Income Tax (1970) 22 DLR 89.

'Sanction', Purpose of sanction to prosecute an officer is to ensure that no unnecessary harassment is caused.

A.K. Reazul Karim Vs. State (1984) 36 DLR (AD) 113.

Sarasori jote—Meaning a tenancy-at-will. *Kalipada Saha Vs. Nityananda Saha (1953) 5 DLR 285.*

Seniority in service

Service Rule in the present case provides for promotion as a result of examination aid further that in order to claim seniority amongst different groups of successful candidates he must be already in service of the department—Date of examination for promotion is not the real date but the date of selection for appointment.

Nazir Ahmad Vs. Pakistan, the Secretary, Ministry of Communications (1973) 25 DLR (SC) 28.

Servant's suit against dismissal does not lie.

Except a suit for damages for money compensation, no other Suit would lie, nor the servant is entitled to any other relief such as his reinstatement to service or a mere declaration that the service was wrongly terminated by the master.

Hasan Ali Vs. Manager, Amin Match Works Ltd. (1967) 19 DLR 307.

Service

R was appointed by the Chief Accounted of K Industries which after emergence of Bangladesh was taken out as abandoned property and placed under the Management of BCI Corporation. The Corporation appointed R as the Administrator of Industries. Later Rs services were terminated by the Corporation.

Held: Corporation could only terminate his service as the Administrator and not his substantive post as the Chief Accountant of K Industries.

BCIC Vs. Sk. Abdur Rashid. (1980) 32 DLR (AD) 133.

—An undertaking taken from a person in the service of the Republic, when illegal..

The Office Memorandum shows that the petitioner was appointed temporarily to be qualified for substantive appointment after passing qualifying examination.

His service was liable to be terminated during the period of temporary appointment on the ground— of unsatisfactory performance or any act or omission prejudicial to good order and discipline in a person in the service of the Republic.

The Office Memo demanded an undertaking by the petitioner to the effect that the service may be terminated at any time without assigning any reason.

Held: The petitioner being a person holding a civil post in the service of the Republic the demand for undertaking in the above terms is *ultra vires* of the Constitution and illegal and as such this undertaking has no legal basis and no legal force.

Md. Jahurul Hoque Vs. Chairman, National Board of Revenue (1980) 32 DLR 13.

—2nd. show-cause notice as a constitutional protection in case of termination of service cannot be insisted on in case of any employee under a statutory authority.

Manager Personnel Division Vs. Md. Sazahan Miah (1983) 35 DLR 224.

—Servant's services liable to be terminated by one month's notice. No action against him was talc- en after inquiry on charges of misconduct—Service terminated by one month's notice—Termination not necessarily mala fide.

Abdul Karim Vs. Prov. of West Pak. (1960) 12 DLR *(SC) 295.*

—Service condition

Appointment to officiate in a service is not the same thing as a temporary post—Distinction between the two explained.

Md. Ismail Hossain Vs. Govt. of Bangladesh (1975) 21 DLR 353.

Md. Ismail Hossain Vs. Govt. of Bangladesh (1975) 27 DLR 355.

—Appointment to a different cadre of higher rank not a promotion.

A person in a lower service if selected by the Public Service Commission for appointment to any established cadre of higher rank then this appointment is of course a promotion in general sense, but this is not a promotion according to service rules. *Ibid.*

—Condition of service-what this expression means.

The condition of service includes remuneration, leave, pension and rights relating to disciplinary matters.

Zainal Abedin Vs. Govt. of Bangladesh (1982) 34 DLR 77.

—Seniority in service—Meaning of seniority in service means actual length of service which can not be determined by a legal fiction as a person's length of age can not be determined by a legal fiction. *Ibid.*

—Service discipline—Attempt to get round the superior officer' order even though indirectly amounts to misconduct.

Md. Nehaluddin Vs. Govt. of Bangladesh (1977) 29 DLR 91.

—Dismissed from service—When such a dismissal is held illegal.

While taking disciplinary action against an employee the Instruction of the Bangladesh Bank is to be followed in conjunction with the Regulations of the Bank—Any deviation whether in following the Instructions or the Regulations will result in injustice and wrong to the employee of the Bank.

Bangladesh Bank Vs. Tarique Ahmed (1985) 37 DLR 143.

—Dismissal from.

Two proceedings were drawn up against the appellant, one of which called for major punishment, such as dismissal from service and another which was drawn up on 4.5.77 called for minor punishment. The appellant was dismissed from service in relation to the proceedings drawn up on 4.5.77, which being illegal cannot be sustained in law.

AZ Rafique Ahmed Vs. BCSIR (1980) 32 DLR (AD) 83.

Efficiency bar

Crossing of efficiency bar and increment of salary cannot be withheld unless there is an unsatisfactory report.

M.A. Rashid A.E. BWDB Vs. Ministry of Power, Water Resources and Flood Control. (1979) 31 DLR 339.

Government—Servant—Confirmation of probationers, in the discretion of the employer Probationers remain as such till appointed to a permanent post—Nor can he claim, when permanently appointed, to be confirmed from the date of the original appointment as probationer though, in usual course, confirmation takes place from the date of original appointment—confirmation is also dependent upon various circumstances.

Muhd. Naseem Ahmad Vs. Miss Azra Feroz Bakht (1968) 20 DLR (SC) 79.

Service-holder, temporary—Appointment was temporary and on an ad-hoc basis for 6 months till the time he was selected by the Public Service Commission for regular appointment—No approval from the Public Service Commission— Appointee's service was however extended for another six months and thereafter his service was terminated as per appointment letter.

Held : Appointment validly terminated. *M.R. Chowdhury Vs. Bangladesh (1977) 29 DLR 325.*

—On commencement of President's Order 115/72, the employees of the Bangladesh Television Corporation have become employees of the Government no matter their service conditions have not yet been determined. Existing terms and conditions of service do not include the right to trade union activities which has been denied by the statute governing the employees in question.

G.S. Television Vs. Chairman. 2nd L Court (1977) 29 DLR 329.

Service-holder—Dismissal from service— Employee of a statutory corporation.

Employee of statutory corporation cannot be placed in the category of relationship subsisting between master and servant and therefore before his dismissal from service of the corporation he is entitled to a show-cause notice—Such employee does not acquire the status of government or public servant.

Managing Director Vs. Hafizuddin Ahmed (1977) 29 DLR (SC) 39.

—M (Respondent herein) was an employee of the Bangladesh Small Industries Corporation, a statutory corporation—Relation between them whether is one of Master and Servant.

Bangladesh S.I. Corporation Vs. Mahbub Hossain Chowdhury (1977) 29 DLR (SC) 41.

—Pay Commission—Pay Commission's recommendations regarding the pay structures of different categories of employees—Acceptance and implantation of such recommendations by the Government—No Government's commitment

regarding acceptance of the recommendations. Government's freedom of action regarding the Pay Commission's recommendations.

SM Masood Al-Mamun Vs. Bangladesh (1977) 29 DLR 393.

—Service and Promotion.

Pay—Officiating post—When an employee is promoted to officiate in a higher post involving the assumption of duties and responsibilities of greater importance he is entitled to the minimum pay of the grade to which he was promoted to officiate.

Post Master General, Eastern Circle (EP) Vs. Muhammad Hashim (1971) 23 DLR (SC) 49.

—Service on Probation—When the probationer continues in his service, even after the expiry of the probationary period and further receives increments of salary—discharging him from service after the expiry of probationary period is illegal.

Probation period subsisted to a maximum period of 3 years, after which the probationer is either to be confirmed or discharged—Here in the present case, after the lapse of 3 years no order either confirming or discharging was passed—No show cause notice served on him as is contemplated under Article 135 of the Constitution —Such order of discharge illegal.

Mustafa Aziz Vs. Principal, Momenshahi Cadet College (1977) 29 DLR 104.

—Punishment for neglect of duty— Offence which requires minor punishment.

Bangladesh represented by the Secretary, Ministry of Public Works Vs. Md. Matiur Rahman (1982) 34 DLR (AD) 285.

—Removal from—with retrospective effect

An order removing a person from service with retrospective effect from the date of his suspension is illegal but it may be deemed to be valid from the date of the impugned order.

Bangladesh Vs. A. Rahman Molla (1975) 27 DLR 429.

—Service—Retirement under invalid

law—Law made valid later on—Person whose retirement declared invalid because of the defect of the law under which retirement order was made can be retired by a subsequent valid law with retrospective effect—Court is not powerless to see and be satisfied that subsequent order not passed malafide, in colourable exercise of the authority.

Even in a case where retirement is made under the amended law and the order expressly shows that it has been made in the public interest, yet the court shall have power to see whether the order is in colorable exercise of power or is malafide or

power to see whether the order is in colorable exercise of power or is malafide or whether it has been made by person by whom it was purportedly made or the person who made it had authority or jurisdiction to make the order.

Mofizur Rahman Khan Vs. Govt. of Bangladesh (1982)34 DLR (AD) 323.

—Security of

Employees (of a local body) without statutory right—Employees under a Municipal Committee (in the present case Collecting Sarkers) whose posts do not carry any legal guarantee to the tenure of service hold the posts at the pleasure of the Committee and liable to be dismissed at any moment.

Munshi Abdul Jabbar Vs. Barisal Municipal Committee (1968) 20 DLR 1186.

—Appointment on probation—confirmation delayed—remedy of the appointee.

Held: The High Court was not correct in its interpretation of rule 5 of the University of Peshawar (Recruitment, Discipline, Punishment and Appeal) Service Rules, and its finding of automatic confirmation in favor of the respondent was erroneous.

Further held: Contract or no contact since the respondent was allowed to serve the university for 16 years his service should not be vanished in thin air and since his service has been brought on regular basis with effect from 5th September, 1961, he should be confirmed from that date.

University of Peshawar Vs. Syed Bashir Ahmed (1971) 23 DLR (SC) 9.

—Termination of: Employees affected by termination not persons in the "service" of Pakistan but were appointed by PIDC—Thcir services terminated on the ground that they were no longer required— Services in such cases are governed by the terms and conditions of employment—Ordinary law of master and servant to be followed.

Held: The respondents were in the employment of the PID. Corporation and were not persons in the "service of Pakistan'. The terms and conditions of their service were not governed by any statutory rules.

There was an allegation about the inefficiency of the respondents in the office note, but the orders by which their services were terminated were not founded on the said allegation and therefore it cannot be said that their services were terminated by way of penalty merely because an allegation about their inefficiency was made in the office note.

Secretary, EPIDC, Dacca Vs. Md. Serajul Hoque (1973)25 DLR (SC) 80.

—Service matter—Cases of dismissed employees other than Govt. servants arc covered by the law of master and servant—Employer competent to terminate employees without serving notice or assigning reasons in exercise of rights reserved by employer under personnel regulations.

Cholera Research Laboratory, Dacca Vs. Md. Mozzammel Huq (1973) 25 DLR 260.

—Tenure of the office of public servants—How long the public servants would be continuing in service is a matter to be determined by the State.

Any protection does not divest the Parliament or the supreme law-making body to regulate the conditions of service, as in the instant case, fixing age of retirement.

Abdur Rashid Vs. Govt. of Bangladesh (1978) 30 DLR 40.

—Suspension from service—Before an order of suspension against a public servant is passed he should be given an opportunity as a matter of right to explain allegations against him.

Shaikh Abdul Quader Vs. Chairman, BADC (1978) 30 *DLR (SC) 96.*

—Condition when conversion to Selection Grade was sanctioned.

The government structure that was existing in 1961 when the conversion of Selection Grade was sanctioned, was different from the governmental structure enticed in the Constitution of 1956.

Golam Mowla Vs. Bangladesh (1977) 29 DLR 422.

—Selection Grade—Promotion in the Selection Grade does not include a contingent matter like the prospect of promotion—Further the appellant having retired from service he has no subsisting right envisaged u/s. 42 of the Specific Relief Act.

Golam Mowla Vs. Bangladesh (1977) 29 DLR 422.

—Terms and conditions of—A regulation relating to the terms and conditions of service framed by a statutory body in exercise of the legislative powers conferred upon it, if made within the ambit of such power, has statutory force and the violation of such a regulation may, in an appropriate case, be nullity.

B.S.I. Corpn. Vs. Mahbub Hossain (1977) 29 DLR (SC) 41.

—Pakistan Supreme Court case on the question of relationship between employer and employee in statutory corporations.

Whenever a person or a body is invested with a legal authority to determine a question affecting the rights of another, his authority is coupled with a duty of acting judicially and of observing the principle of natural justice. *Ibid.*

—Service terminated.

A's service was terminated by the Management of the Company in which he was employed on the ground that his service was no longer required. On evidence it has

been established that A's service had been terminated because he took active part in union affairs.

Held: His service has been improperly terminated.

Md. Hyas Khan, Manager Vs. Third Labour Court, Khulna (1972) 24 DLR 250.

—Termination of

Dismissal of an employee of statutory corporation. Before an officer or employee of a statutory Corporation is dismissed or removed from service or his service is terminated, he should be given an opportunity to show cause against the proposed action and that he shall not be condemned unheard.

MA Hai Vs. TCB (1979) 31 DLR 326.

—Termination of; Authority can terminate service under service condition without resort to penal measures—Ordinary law of master and servant to apply.

It was open to the competent authority not to have recourse to disciplinary action but to terminate the services of the employee by notice in accordance with the conditions of his employment.

As long as the action to dispense with the services of an employee is in accordance with the terms on which he was employed, it is wholly immaterial whether the reason for the termination was misbehavior or some other reason.

The terms and conditions of employment of the respondents were not regulated by any statutory rules but were governed by their contracts of employment. That being so, the ordinary law of master and servant was applicable and under that law the Corporation was entitled to terminate the services of the respondents without giving them any opportunity of showing cause against the proposed termination, particularly when the impugned orders themselves do not show that their services were terminated by way of penalty.

Secretary, *EPIDC. Dacca Vs. Md. Serajul Hoque (1973) 25 DLR(SC) 80.*

—Service of an employee—Witnesses examined should be in the presence of the employee with his right to cross-examine. Grounds should be given when higher punishment than recommended by the Enquiry Officer is inflicted.

MA Hai Vs. TCB (1980) 32 DLR (AD) 48.

—Termination of service (even of a temporary employee) on grounds which cast aspersion. etc. on his character—Opportunity to show-case against his dismissal should not be denied.

Md. Abdur Rasheed Vs. Govt. of Bangladesh (1978) 30 DLR 231.

—Transfer of service-holder Contracts of personal service is not assignable.

It has been contended that power of transfer is implicit in the employer. As a general proposition this may be correct. But here the appointment letter stipulates "that the employee will be liable to be transferred in any gardens under the BTIMC." But in the present case the respondent has not been transferred to any garden under the BTIMC. On the contrary, his service has been transferred to a new Company which happened to purchase the tea garden which once belonged to the BTIMC and which now is the new employer. The respondent was not party to the agreement of transfer and he could be an employee if he consents either expressly or impliedly. Hence the impugned order of transfer was without his consent.

General Manager, Bangladesh Tea Industry Management Committee vs. F Chowdhury (1982) 34 DLR (AD) 27.

Service-tenancy—Resumption of.

There is a distinction between the grant an estate burdened with a certain service and that of an office, the performance of whose duties is remunerated by the enjoyment of certain lands. In the former case the Zamindar is not ordinarily entitled to resume, while in the latter case, he may do so where the office is terminated. Thus, the position is that in the case of a grant of an office remunerated by land, the land is prima facie resumable, but in the case of a grant of a land being burdened with service, the land is *prima facie* not resumable, but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable and the onus of making out such a condition would always be upon the granter.

Panchanon Behara Vs. Fate Mahmud Fakir (1955) 7DLR 139.

"Shall"

—The word "shall" is not always obligatory; it may, in certain circumstances, be directory.

Muhammad Abdus Salam Vs. Chairman, E.P. Election Authority (1965) 17 DLR 191.

—'Shall be final'

Revision to the High Court under section 115 of the Code of Civil Procedure would lie only on those cases where no appeal lays, which, in other words, means where the decision of the lower Court is final. The mere fact that the statute has expressly stated that the decision of the District or Subordinate Judge shall be final does not oust the jurisdiction of the 1-ugh Court to interfere under section 115 of the Code.

Afsaruddin Bhuiya Vs. Wazid Ali Khan (1952) 4 DLR 442; Azizul Huq Vs. Hanif (1955) 7 DLR 287.

—'Shall be indefeasible'

The word 'shall be indefeasible' mean 'liable lo be defeated' and not 'shall be void'.

Kesarmal Vs. N.K.V. Valiappa Chettiar. (1955) 7 DLR I (PC).

Share and area.

Document describes both the share as well as the area to be transferred—Which one to prevail when there is a difference between the two.

To go by the share mentioned in the document as the share sought to be transferred without taking the other parties of the document into account may result in forcing an intention upon the executants of the document which he did not possess. Taking the share alone as the guiding factor where there are in other places in the document a description of the extent of-that share sought to be transferred would be unreasonable, for, it may well be that the parties understood the share mentioned in the document to comprise only that particular quantity of land and not more.

Safiuddin Kazi Vs. Moslem Ali Howladar. (1960) 12 DLR 266.

—'Small Industries Corporation'—Is a local authority and before it dismisses an employee the latter is entitled to a precedent hearing. *BSI Corpn. Vs. Mahbub Hossatn (1977) 29 DLR (SC) 41.*

"Sovereign act"—What the expression connotes.

The expression 'sovereign act' is applicable only to acts committed in relation to other states or aliens and is inapplicable to a case where the Government is acting in relation to its own citizens. In the latter case the Government has authority to act only in accordance with the Municipal law.

Pakistan Vs. Md. Yaqoob Butt (1963) 15 DLR (SC) 369.

"Special Bench"—Special Bench (of a High Court) when takes a view on a question of law different from that of another Special Bench, procedure to follow.—Utmost care necessary to preserve the high authority of the High Court.

Being charged with the high I unction of interpreting and pronouncing upon the validity of laws and being thus itself a source of law, the High Court should avoid giving a decision directly inconsistent with that given by itself earlier, and thus speaking with two voices on a point of law, where no question arose of resolving inconsistency between two or more earlier decisions.

Province of East Pakistan Vs. Sirajul Huq Patwari (1967) 19 DLR (SC) 281.

Special statute

In cases where the jurisdiction of the civil court is excluded by a special Statute the court has inherent jurisdiction only to see whether the Special Act under which the special tribunal acted applied to the case and not because contravention of the provisions of the Special Act is alleged.

Md. Ataulla Sowdagar Vs. Daliluddin Ahmed. (1953) 5 DLR 503 (506 rt.h.col).

Stamp reporter.

Stamp reporter has no power to correct irregularities in the original decrees.

Patak Chandra Halder Vs. Sadernan Hawladar (1957) 9 DLR 190.

—Time-barred appeal—Stamp Reporter to return the memo of appeal—Party's responsibility.

The duty of the Stamp Reporter is nothing more than to report the sufficiency of the stamp fixed on the memo of appeal and to report if it is in time but he has n power to retain a time-barred appeal in his hand. The moment the memo of appeal is returned it becomes incumbent on the party to explain as to why the said memo of appeal could not be filed in due time.

Province of East Pakistan Vs. Md. Habibur Rahman, (1973) 25 DLR 254.

"Standing Orders"—Rule 21 and 23.

Workman removed from service under rule 21, though for misconduct might be dismissed under rule 23. Its effect.

Although rule 23 of the Standing Orders provide that an employee found guilty of misconduct may be dismissed without notice or without salary in lieu of notice, yet it is open to a Company not to enforce any such penal provision and under this rule the Company instead may proceed to terminate the service of the employee by a discharge notice tinder rule 21 of the Standing Orders and where therefore an employee even though guilty of misconduct has been discharged under rule 21, provisions of rule 23 will not be attracted to such a case.

Glaxo Laboratories (Pak) Ltd. Vs. Pakistan (1962) 14 DLR (SC) 17.

'Stare decisis'— The fact that for a quarter of a century no one attacked the patent invalidity of an Act and that a series of decisions all proceeded on the assumption that it was a valid law is not a cogent reason to disregard the conclusion convincingly arrived at that consistently with the Constitution the validity of the impugned provisions could not be sustained.

Attorney General of Australia Vs. The Queen (1958) 10 DLR 9 (PC).

—When it cannot successfully be invoked—The mere fact that some Courts of the country have for a few years adopted a particular interpretation of a legal provisions, is, by no means a sufficient reason for maintaining that interpretation, if it is clearly opposed to some general principles. The principle of 'stare decisis is not applicable to a case where only some of the Courts in a country have taken a particular view and that too for a comparatively short period.

MA Chowdhury Vs. Messrs. Mitsui OSK Lines Ltd. (1970) 22 DLR (SC) 334.

State as a litigant—Has no higher status than an ordinary citizen—Its obligation in implementing court's decree.

Once a decision has been given by a court of law, the State, as a party to the proceedings, stands on the higher footing than an ordinary litigant and its duty to honor the court's decree in the letter and the spirit would be too obvious to require any emphasis. Indeed the State might be thought to have higher and more direct responsibility in maintaining the authority of the courts and that responsibility is clearly inconsistent with a deliberate design to avoid implementing a solemn decree awarded by a court.

Govt. of West Pak. Vs. Fazl-e-Huq Musarrat (1960) 12 DLR (SC) 88.

—State policy of education—Under the directive principles of State, these are not enforceable in court of law.

As for the state policy of education the learned Judges have taken upon themselves an enquiry which is neither arrantcd by law in the Constitution nor by the arguments of the parties. It is for this reason that the constitutional mandate provides in the chapter on Directive Principles of State Policy that these are not enforceable in the Court of law.

Bangladesh Vs. Winifred Rubil (1982) 34 DLR (AD) 162.

'Status quo' means the existing state of things at any given time. [*See Wastom's Law Lexicon, 14th Ed.I (1969) PLD (Kar) 350.]*

Statute—Special statutes which makes provision for appeal against its decision—It is that procedure that must be resorted to in an appeal as provided in the statute itself and riot otherwise.

Where appellate authority is provided by the statute, any omission or irregularity committed in the course of the proceeding under the statute will be a matter for that authority and not for a court of law.

Md. Abdul Jabbar Vs. Asia Khatun (1976) 28 DLR 333.

—Statutes are to be interpreted prospectively, unless the language of the statutes makes them retrospective, either expressly or by necessary intendment.

"It is a fundamental rule of English Law that statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and a subordinate rule to the effect that a statute is not to be construed so as to have created retrospective effect than its language renders necessary".

A. *Mannan Vs. Kulada Ranjan (1979) 31 DLR (AD) 195.*

Statutory Corporation—establishment of, when necessitated.

The most likely field for State enterprises in an expanding economy is where private enterprise in new industries is shy and where the risks arc great. This is one of the major motives for establishing a public corporation, and other forms of Government enterprise. *Mahbub Hossain (1977) 29 DLR (SC) 41.*

Stay order

Order passed during the subsistence of stay order—void.

An order passed by an inferior Court during the subsistence of a stay order made by a superior Court is an absolute nullity. *PLR (1960) 2 WP 751(FB).*

Stock Exchange

Deposit of money in the Stock Exchange made by a member of the Stock Exchange to satisfy claims of other members when becomes a debt and amenable to the orders of the Court—Time factor, under the Rules, whereby the deposit becomes debt.

Mrs. Purviz ceased operations as a broker in January 1961. The application by the plaintiff for the deposit into the Court was made in February, 1962, that is, after period of one year. The Forward Contract Rules which regulated the transactions of the Stock Exchange, Karachi and contain provisions for settlement of forward contracts, show that these contracts are to be settled at the end of each week or at the latest at the end of each month; this means any forward contracts by Mrs. Purviz should have been settled long the application in February, 1962 was made. Consequently, Mrs. Purviz had become entitled to withdraw the whole of her deposit of Rs. 15,000 from the Karachi Stock Exchange.

From this fact it follows that the deposit had assummed the character of a debt due from the Exchange to Mrs. Purviz and, therefore, the Stock Exchange cannot be allowed to hold on to the security deposit and as such amenable to the orders of the court restraining Mrs. Purviz from withdrawing the aforesaid sum.

Karachi Stock Exchange Vs. Kurban Ali M. Merchant, (1973) 25 DLR (SC) 82.

Submergence

When the land is sublimated and is not capable of being possessed by anyone, the rightful owner must be deemed to be constructively in possession.

If title is transferred during the submergence, the transferee, and not the transferor, must be deemed to be in possession from the date of the transfer. It makes no difference whether the transfer is by a private treaty or by a court sale.

Rahij Uddin Sarkar Vs. Monser Ali Shaikh (1953) 5 DLR 344.

Subordinate legislature.

Rules made by a subordinate legislature, if *ultra vires*—(Income Tax Rule 9).

Held: Learned Judges have fallen into an error of law in coming to the conclusion

Held: Learned Judges have fallen into an error of law in coming to the conclusion that the provisions similar to those contained in rule 9(2) of the Income Tax Rules can only be made by a legislative enactment and not by subordinate legislation made by National Board of Revenue.

The law itself has given the power to the National Board of Revenue to determine the percentage by prescribed rules and Rule 9 is such a rule. The judgment of the High Court Division is wrong.

M/S. Everett Orient Lines Inc. Vs. Commissioner of Income Tax Chittagong Zone. (1982) 34 DLR (AD) 342.

Succession to property—Custom, Force of.

(Custom in Punjab)—Custom that devolution of property has a preference over the personal law of the parties, is limited to the ancestral property only and not to non-ancestral property and in case of latter, the governing law is the personal law.

Mst. Qaiser Khatoon Vs. Mvi. Abdul Khaliq, (1973) 25 DLR (SC) 104.

'Such term'.

A relative term like the word 'such' is normally to be construed as applying to the next precedent antecedent and not as extended to or including others more remote.

Al-Haj Abdur Rahman Bhuiya Vs. Commissioner Narayangonj Municipality (1958) 10 DLR 431.

Suit for—Damages by Govt. servant

Suit for damages in tort brought by a Government servant against the State as well as Government servant's right to claim future salary—not maintainable.

Pakistan through General Manager, NWR Vs. M/s. AV Issacs (1970) 22 DLR(SC) 371.

—Suit for declaration that the plaintiff is still in service—was filed before emergence of Bangladesh as a sovereign independent State—After such emergence the declaration shall be that the plaintiff was in service in the particular cadre in his the then capacity on the date of institution of the suit.

Govt. of Bangladesh. Vs. Dr. M. Nasiruddin (1980) 32 DLR 214.

—Suit for specific performance of contract seeking a decree for execution of Kabala —Title does not pass merely on the passing of a decree.

Held: In this case the suit is for specific performance of contract and so unless a decree on the contract is given and is completed by execution of the Kabala, no tide accrues in favor of the purchaser and hence the question of possession becomes secondary. In a suit of this nature possession is not linked up with the main claim of the suit, as the title does not accrue on the passing of the decree.

Banabir Purkayastha Vs. Alekjan Bibi (1982)34 DLR (AD) 98.

—Suit and service of notice—Suit must be dismissed, irrespective of defendant's not raising the plea, when notice under section 109(I) of the Chittagong Port Act is not served.

A suit without notice as required under sec. 109 (I) Chittagong Port Act, must automatically be dismissed.

In the context of the special features of section 109(I), "accrual of the right to sue" in section 109(2) cannot be co-extensive with "accrual of the cause of action". Plaintiffs right to sue has been positively obstructed by the provision of notice in section 109 (I). He can file a suit without a notice only on the pain of mandatory dismissal which will be automatic, even if the defendant fails to plead absence of notice or even if the defendant waives the notice. Under the circumstances, plaintiffs Liberty to file a suit is not a right to sue at all. His right to sue accrues only after the expiry of the notice period of one month.

The Trustees of the Port of Chittagong Vs. Sadharan Bima Corporation and others (1980) 32 DLR 99.

—Suo-motu rule

The Court having become *functus officio*, after delivery of judgment, issuance of *suo-motu* rule to determine the question of compensation, not lawful.

Habibullah Khan Vs. Shah Azharuddin Ahmed (1983) 35 DLR (AD) 72.

Superior authority's interference

When a subordinate authority is authorized to dispose of a matter it is legally seized of, any opinion by a higher authority in the performance of its duty is illegal and vitiates the legality of the order.

BS Industries Vs. Dy. Registrar (1968) 20 DLR 787.

Supreme Court

Fresh point involving investigation into facts disallowed in appeal.

The point that appointment in Class I post by the Postmaster-General without the approval of the President was itself bad, was not raised before the High Court This point when raised before the Supreme Court was disallowed since investigation into facts may be necessary to find out whether approval of the President was or was not obtained.

The Postmaster-General, Eastern Circle (EP) Vs. Muhammad Hashim (1971) 23 DLR (SC) 49.

—Supreme Court's power of superintendence.

The Supreme Court (in our country the Appellate Division) can exercise the power of superintendence in the appropriate circumstances.

AT Mridha Vs. The State (1973) 25 DLR 335.

—Special leave to appeal to the Supreme Court in case of delay of 52 days by the Government where the detention of a citizen has been declared by the High Court illegal—Supreme Court refused to condone the delay of 52 days.

A.K.M. Muklesur Rahman Vs. Bangladesh (1977) 29 DLR (SC) 37.

—It is difficult to concur with the view that the Industrial Development Corporation of East Pakistan had no public character as expressed in the judgments in the case of Chairman E.P.I.D.C. Vs. Rustom Ali (1967) 19 DLR (SC) 186 as to the character of the Corporation concerned.

BSI Corporation Vs. Mahbub Hussain (1977) 29 DLR (SC) 47.

—Supreme Court's judicial powers.

Per Kemaluddin Hossain CJ—Full judicial powers have been conferred by the Bangladesh Constitution on the supreme judiciary as an independent organ of Slate. It has power to declare a law passed by the Legislature inconsistent with the Constitution or fundamental rights *ultra vires.*

The supreme judiciary has also been conferred with the powers of judicial review of executive acts and other judicial acts and proceedings of subordinate courts or tribunals under Article 102.

Jamil Huq & Ors. Vs. Bangladesh (1982) 34 DLR (AD) 125.

Suspension or abatement

There is hardly any difference between suspension of a suit and abatement of a suit. Both these expressions mean that the suit or proceedings in a Court of law will stand over for the time being.

Amiya Kumar Tarfdar Vs. Province of East Pakistan, (1973) 25 DLR 304.

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WORDS AND PHRASES [T - W]

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Subject: Words and Phrase

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Words and Phrases

Tax and Company—'Lifting the Veil' theory—When a Company in order to avoid tax payment changes its name—Courts to look close into the matter.

Govt. of E Pak. Vs. M/s. Lucky Biri Company (1978) 30 DLR 411.

'Tax' and 'toll'.

A tax does not aim at conferring any direct benefit upon any particular individual and there is an element of quid pro quo between the tax payer and the public authority while, on the other hand, fee or a toll is a charge for a special service rendered to some individuals by the agency authorized to charge a toll or fee.

A tax toll or fee is imposed in public interest and in a toll or fee individuals receive some special benefit while in the case of a tax there is absence of such direct benefits or advantages and if there is one it is incidental to the action of the State.

Zaminur Rahman Vs. Bangladesh (1979) 31 DLR (AD) 171.

Technical objection—when fundamental

Where technical objection of a decision goes to the root of the matter, i.e., the decision challenged rests on an issue not raised in the action, it must be given effect to if justice is to be done.

Attorney- General, Fiji Vs. JP Baylay (1951)3 DLR 482 (PC).

"Temporary employment" Distinguished from non-temporary employment.

It was contended that the petitioner was a temporary employee and therefore was not entitled to constitutional protection and reliance was placed in the case of Muhammad Umar Vs. Malik Hakim Khan and another reported in PLD 1968 Lahore, 1093.

Held: If no definite period of employment is specified then employment is non-temporary employment as distinct from a temporary employment which must be for a definite shorter period.

Mir Alauddin Ahmed Vs. Province of E.P. (1975) 27 DLR 394.

—Appointed temporary—Various implications of the expression explained at length.

Saleh Ahmed Joarder Vs. People's Republic of Bangladesh. (1984) 36 DLR (AD) 26.

—The interpretation of the expression 'temporarily' would, therefore, depend more upon the intention of the maker of the order and the subsequent conduct of the appointing authority. To put it differently, whether in making the appointment the authority was intending to make permanent appointment a temporary one or whether, though intending to make a temporary appointment, by its subsequent conduct it was treating the appointment made temporarily as a permanent one. Thus, the temporariness or permanence of an appointment would not depend so much upon how it has been qualified but would depend upon whether the appointment is intended to be permanent, though apparently made temporarily. *Ibid.*

—Temporary post alternating between Chief Engineer's office and subordinate office —Service in Chief Engineer's office over long period does not confer a lien or vested right—Reversion on promo- lion to temporary Assistant, to subordinate office does not involve a violation of natural justice or denial of right—No reduction in rank caused.

Pakistan Vs. Hassan Ali Jafari (1960) 22 DLR (SC) 148.

Tenant—Meaning of—The English term 'tenant' ordinarily means an occupier of immovable property having a kind of relationship respecting the said property with another person who is generally called the 'landlord'. The relationship of landlord and tenant generally arises when the owner of the property confers by demise a right of exclusive possession of that property upon another person on condition of periodical payment of what is called rent.

M.H. Khandker Vs. Bangladesh (1978) 30 DLR (SC) 1.

Tenant

BT Act - S. 3(17):—Even after the Amendment of the B.T. Act in 1929, a bargadar can raise a contention in any Suit that he is a tenant.

Osman Ali Vs. Sukumar Majumdar (1978) 30 DLR 250.

—Tenant or bargadar—the test before the BT Act's amendment of 1928.

Rent paid was fixed at 'hal' the crop in which cess is also included—A person holding the land as such, as recorded in Khatian before the amendment of the Bengal Tenancy Act in 1928—Must be held a raiyat with occupancy right and not a bargadar or adhior.

Sadullah Pramanik Vs. Md. Khalilur Rahman. (2984)36 DLR (AD) 188.

Tenancy—Original purpose may be shown to have been changed,

It is difficult to hold that parcels of land though originally comprised in a raiyati holding and used by non-cultivators for purposes other than agricultural, and horticultural, should still retain the original charter of an agricultural land.

Athar Ali Vs. Renuka Bala Roy Chowdhury (1960) 12 DLR 758.

—**Tenancy under in BT Act.**

Document, if written, must be registered

If any party resorted to any document creating a permanent tenancy, it must be registered but if the document is not registered, the tenant can prove his tenancy independently of the written lease, inasmuch as under the Bengal Tenancy Act no written lease is necessary for the creation of the tenancy.

Hochen Mondal Vs. Miraj Ali (1952)4 DLR 457.

—An agricultural tenancy can be proved without proving the lease if there is any. *Mohammadi Steamship Co. Vs. M/s. Dada Ltd. (1958) 10 DLR 474.*

Tenure Post—The expression "Tenure post" as defined by Fundamental Rules 9 is a permanent post which an individual Government servant may not hold for more than a limited period. A tenure post is one which cannot be held for more than the prescribed period without an order of extension; it is not to be understood to mean a post which is to be held for the period prescribed, once the appointment is made.

Pakistan Vs. Fazlur Rahman Khandkar, (1959) 11 DLR (SC) 253.

"Terminal tax"—Liability of goods to pay terminal tax

Though the terminal tax could not be levied in respect of goods imported by sea or air it could be validly levied on goods imported by rail or mad even after the coming into force of the late Constitution. Furthermore, the tax could not be levied on goods merely in transit. Where, however, the goods were unloaded at a rail head or terminal point within the municipal limits for transportation outside, the tax could be levied on such goods as there would then be a terminal tax limits. A terminal tax was by its very nature a tax chargeable at a terminal point or one which could be referable to some service, whether of caniage or otherwise, rendered or to be rendered at a terminal point.

Pakistan Tobacco Co. Ltd. Vs. Karachi Municipal Corporation (1968) 20 DLR (SC) 109.

—Termination of service.

Dismissal or discharge of an employee carries with it penal consequences—Compulsory retirement does not carry any such consequences in which case show

Compulsory retirement does not carry any such consequences in which case show cause notice can not be issued.

MA. Rashid, Assistant Engineer, Bangladesh Water Development Board Vs. Secretary, Ministry of Power, Water Resources and Flood Control. (1979) 31 DLR 339.

—Termination of tenure.

Termination of tenure dates from the institution of the suit for its annulment. Revenue sale as has been held terminated the proprietary interests of the plaintiffs in the touzi but it did not automatically wipe Out the under-tenures in touzi. The sale only rendered these under-tenures voidable at the option of the purchaser. He was to exercise his option by institution of a suit, by serving a notice upon the under-tenure holder, by collection of rents or by some other overt act clearly indicating his intention to annul.

Amulya Chandra Kundu Vs. Monendra Nah Biswas. (1979) 31 DLR 75.

"Territorial Waters' and 'Economic Zone' are different things—Territorial water which is a 12-miles sea belt from the base line is same as Customs Water as defined in the Customs *Act.*

M. Samboon Asavhame Vs. Bangladesh. (1979) 31 DLR 256.

Textile machinery all sorts—. Explained: "Textile Machinery all sorts" in Item I of Annexure V. H. of the Import Policy Order has a reference to the different kinds of textile machinery, such as cotton textile machinery and silk textile machinery. The expression has reference to maintenance spares under Item 28 of the Free List of the Import Policy Order, 1965-66.

East Pakistan Textiles Mills Ltd., Vs. Govt. of Pakistan, (197O) 22 DLR 816.

Thak and survey map.

If thak and survey maps show that the land formed bed of a river, it cannot be assumed that it was dry land at the time of the permanent settlement.

Province of Bengal Vs. Jamila Khatun Chowdhurani (1952) 4 DLR 222.

—Thak and survey map—Lands included in—No conclusion that they existed during the Permanent Settlement.

TI cannot be presumed as a matter of law that the state of things described in the thak and survey maps existed at the time of the Permanent Settlement.

The question what lands were included in the Permanent Settlement is a question of fact and not of law which may or may not be satisfactorily proved by subsequent survey maps. The onus of proving, that any particular lands were included in the Permanent Settlement of 1793 is clearly on those who affirm that such was the case, and the burden of proof is not necessarily shifted by the production of the thak and survey maps showing that specific lands are included in a particular estate.

Shamser Mandal Vs. Bhagyaban Biswas. (1960)12 DLR 510.

Time-barred appeal.

Condonation of undue delay for correcting the cause title of appeal cannot be granted when the party was guilty of negligence.

Province of East Pakistan Vs. Major Nawab Khawaja Hasan Askary, (1970) 22 DLR (SC) 425

'To sue'—What it means.

The words 'to sue' not only signify 'prosecute' but also 'to defend', or to do something which the law requires for the beuer prosecution or defense of the cause.

Bhaba Kanta Joddar Vs. Satish Chandra Mandal (1960) 12 DLR 649.

"Tort"—Liability of Government for tortious acts of its servants.

It was contended that no suit for tort could lie against Government in respect of acts done by its servants just as no action can in such a case lie against the Crown in England.

Held: The constitutional status of the Crown of England is wholly different from that of the Government of Pakistan.

Pakistan Vs. Muhammad Yaqoob Butt. (1963) 15 DLR (SC) 369.

—Damages for negligence—Joint and several liability—Decree can be executed against any.

Action being in tort instituted against a firm of which defendant 2 is a partner the several partners will be liable severally and jointly as joint tortfeasors and if any negligence could be proved as against the firm defendant No. 2, who is one of the partners of the said firm would be liable for the damages jointly as well as severally and the decree for the entire damages could be awarded against him.

Abdul Awal Vs. Mofasiluddin Ahmed (1975) 27 DLR 628.

—Action in tort—Liability to damages may arise out of general relationship—Duty to neighbor—Reasonable foreseeability is an important element of a neighbor's duty of care—Immunity in certain cases.

Abdul Awal Vs. Mofasiluddin Ahmed (1975) 27 DLR 628.

—Is a defamatory statement.

The word 'tout' is an expression which is highly offensive, and hence its application to a person of normal reputation and standing would be prima fade defamatory of him.

M. Moosa Vs. Mahamad (1967) 19 DLR (SC) 507.

'Towns' and 'urban areas'

The words 'towns' or 'urban areas' have no statutory definitions or precise connotation at the time when the E.P. Urban Immovable Property Tax Act was promulgated and such terms mean in ordinary municipalities and other areas where the dominant pursuit of life is other than agriculture.

Amin Jute Mills Vs. Bangladesh (1977) 29 DLR (SC) 86.

Trade Mark.

Trade Mark—Notice of registration—Publication of trade mark in Trade Marks Journal does not constitute a notice of registration.

Haji Abdul Rahim Vs. Abdul Wahid (1971) 23 DLR (Karachi) 25.

—Trade mark, dispute about trademarks, should not be taken to criminal court, should be decided by civil court.

Md. Salahuddin Vs. Abdul Hakim. (1983) 35 DLR 192.

—Infringement of—Court's approach to such a question. In an action for infringement of a registered trade mark the court must of necessity enquire whether the defendant's trade mark is identifiable or deceptively similar to the plaintiffs trade mark.

Dacca M.F. Ltd. Vs. Bangladesh Match Company (1978) 30 DLR 244.

"Trespasser"—Persons already in peaceful possession of land in assertion of title are entitled to recover possession of the same from a trespasser who dispossessed him, although the title of the person possessing the land had not yet become perfect.

Although the defendants were not parties to the documents and the suits still the peaceful possession of the Dastidars and after that of the plaintiffs' (in succession to the Dastidars) being earlier and peaceful such possession could not have been disturbed by the defendants who, are mere trespassers. The plaintiffs are, therefore, entitled to a decree in respect of the entire disputed plot No. 7 although paramount title deed does not cover the whole of that plot.

Mahabulla Vs. Abdul Aziz (1968) 20 DLR 324.

—Trespasser can maintain his possession— except against the true owner. Plaintiff in possession may resist the defendant who has no better title than the plaintiff.

Mukhlesur Rahman Vs. Shaukat Ali (1984) 36 DLR 285.

Trial Court—Its finding.

An appellate Court would not ordinarily interfere with the findings of fact of a court of first instance but this principle is not without exception. Where the (I) facts are such that the appellate Court is in a similar position with the original court to sift and weigh the evidence; when; (2) the oral testimony has not received due consideration in the original court; and where (3) the disbelief of witness by the trial court is based on an alleged contradiction which is in reality a mere incapacity of the witness to remember or explain a certain thing—then in all such cases the appellate tribunal would be unfettered to examine the evidence afresh and arrive at an independent decision.

Md. Akbar Abdul Sattar Vs. W.L. Bogtstra (1956)8 DLR (PC) 19(23).

—Trial Court's order sheet

Trial Court's order-sheet shows that both the plaintiff and the defendant admitted certain facts. Neither the plaintiff nor the defendant was examined in the case nor any affidavit was filed admitting such facts—Trial Court decreed suit relying on such facts—Trial Court decreed suit relying on such admissions.

Held: Observations of the Trial Court regarding such admissions have a legal presumption of correctness and unless dislodged, should prevail.

Syed Modaris Ali Vs. Syed Md. Ilias Ali (1972) 24 DLR 191.

Tribal Area—Laws which were in operation before Independence in Tribal Areas did

not lapse with the Independence Act of 1947 but continued even after that.

Superintendent, Land Customs, Vs. Zewar Khan, (1969) 21 DLR (SC) 408.

Tribunal

The question whether an act is judicial, quasi judicial or administrative is clouded by a confusion which it is extremely difficult to resolve.

The true question in which character a tribunal acts always is whether the act which is complained of is a judicial act and not, whether the procedure adopted by the tribunal is judicial or quasi judicial or whether the dominant or general aspect of the tribunal is that of a judicial, quasi judicial or administrative body. A Tribunal is not always furnished with the trappings of a Court, nor will such trappings make its action judicial.

Tariq Transport Co. Vs. Sargodha Bhera Bus Service (1959) 11 DLR (SC) 140.

—Words 'Tribunal' and 'Courts in Art. 102(5) explained. The word 'tribunal' does not mean the same thing as 'court' but includes within its ambit adjudicating bodies provided they are constituted by the state and are invested with judicial as distinguished from purely administrative or executive functions. The expression 'tribunal' has been used along with 'court' in sub-article (5) of Article 102. The 'court' acts judicially and 'tribunal also acts judicially or at least quasi-judicially.

Bangladesh Vs. AKM Jahangir Hossain (1982) 34 DLR (AD) 175.

"Turnover"

The expression 'turnover' means the aggregate amount for which during the year of taxation, the dealer bought or sold "goods' of the kind enumerated in the definition of "goods" contained in the Pakistan General Sales Tax Act, 1948.

Commissioner of Sales Tax, Central, Karachi Vs. Dada Plastic Works (1965) 17 DLR (SC) 80.

Undue influence—Allegation of undue influence—Burden of proof.

The Privy Council, in the case of Harmes Vs. Hinkson AIR 1946, PC. 156. held that "the burden of proving that the will is the outcome of undue influence exercised on the testator is on those who attack the will".

Paresh Chandra Bhowmick Vs. Hiralal Nath (1984) 36 DLR (AD). 156.

—Illiterate village woman though not a pardanashin is entitled to protection extended to the latter when evidence shows that under the influence of the defendant she executed a sale-deed.

The object of the rule of law, which is applicable to pardanashin ladies, is to protect the weak and helpless and consequently such a rule should not be restricted to that class only but should apply to the case of a poor woman who is equally ignorant and illiterate though not a pardanashin woman in the strict sense of the term.

Sree Sree Gopal Jeo Bigraha Vs. Mahmuda Begum (1968) 20 DLR 192.

—Undue influence—pardanashin lady—burden of proof. *Srimati Bidhumukhi Dassya Vs. Srimati Sarala Sundari Dassya (1954) 6 DLR 97.*

Universal Declaration of Human Rights—Municipal Law

Article 13 of Universal Declaration of Human Rights adopted by the UNO in 1948—Not part of Municipal Law and so, of no binding effect.

Syed Abul A'ala Moududi Vs. The State Bank of Pakistan, (1970) 22 DLR (WP) 57.

Umpire.

An umpire is a person appointed to take over the reference from the arbitrators who are unable to agree amongst themselves. In general, he is in the position as a sole arbitrator, must be appointed in the same way, and must possess the same qualifications or absence of disqualifications. An umpire has no power to act until the arbitrators disagree.

Umpire assumes jurisdiction only when there is a disagreement between the arbitrators. The mere fact that the umpire has signed the award in the absence of any disagreement between the arbitrators is superfluous.

Majibul Hoque Meah Vs. Ali Ahmed, (1973) 25 DLR 286.

Vagaries of high governmental official.

Pre-motivated action—Suspension proposal made by the Secretary of a Govt. Department was rushed through with unusual haste, using in the process a venue unconnected and farfetched to get the approval of the Minister and also of the Vice-President—Ignored normal official hour to get hold of the concerned person for service of the suspension order—all in the course between 5th and 7th January, 1981.

Salahuddin Khan Vs. Bangladesh (1982) 34 DLR 120.

—Secretary guilty of making false statement in his note to the Vice-President.

The Secretary's note dated 5.1.82 to the Vice- President specifically stated that the proposal to suspend the petitioner had the approval of the Minister- in-Charge, whereas Annexure 2 shows that the Minister-in-Charge had approved it a day after on 6.1.82. *Ibid.*

Validation of law declared illegal, when can be done.

Ordinarily, a court holds a law to be invalid because the power to enact such law is wanting or it does not sufficiently create the jurisdiction. Validation of a law so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the law made competent.

Mofizur Rahman Khan, Vs. Govt. of Bangladesh (1982) 34 DLR (AD) 322.

'Vendor' sometimes may mean proposed vendor—A party who proposes to sell anything, whether selling it or promising to sell it, describes him sometimes as a vendor which in a case of promise to sell mean a proposed vendor.

Enayet Hossain Chowdhury Vs. Member, Board of Revenue, East Pakistan (1960)12 DLR 466.

"Vested interest"

An interest is said to be vested when it is not subject to any condition precedent. A person takes a vested interest in property when he acquires the proprietary right in it, but the right of enjoyment is deferred till a future event happens which is certain to happen. An interest may be a vested one, though its enjoyment' may be postponed.

Jalil Ahmed Vs. Province of East Pakistan (1967) 19 DLR 106.

Vested right

Legislature by clear and unambiguous language, can take away vested right with retrospective effect. *Messrs.*

Haider Automobile Ltd. Vs. Pakistan (1970) 22 DLR (SC) 65.

Void order—its nature

An order which is *void ab initio* cannot be quashed any more than it can be upheld because a thing which has never existed is not capable even of destruction. *PLR (1960) 2 WP 751 (FB).*

—Void and voidable sale—Distinction between. *Santosh Lal Saha Vs. Dakhina Ranjan Chowdhury (1953) 5 DLR 81.*

Waiver—public policy

No waiver where observance of law is required by public policy. *Dhirendra Nath Datta Roy Vs. Sudhindra Chandra Chakraborty (1959) 11 DLR 151.*

Wakf

Wakf created without making provision for charitable purposes of permanent nature is not a valid and legal wakf—Provision made by wakif for feeding persons who might be present at his death and burial is not a charitable object to make the wakf valid.

Abdur Rahim Vs. Kaptan Mia (1973) 25 DLR 290.

Wakf-al-al-aulad

For application of section 4(b) of the Agricultural Income Tax Act to a valid wakf-alal-aulad created by a Muslim, it should be considered on the basis of the basic principle of the institution of wakf as contemplated under the Muslim Law.

Director of Taxation Vs. Mehdi Ali Khan (1980) 32 DLR (AD) 138.

—The legal meaning of wakf, according to the accepted rule of Hanafi School of Muslim Law, is the extinction of the proprietor's ownership in the property dedicated and its detention in implied ownership in God in such a manner that the profits may revert to and be applied for the benefit of the mankind. *Ibid.*

—Shariat Law—Western conception of charity differs from shariat law.

What in the estimation of the Western Jurists could be pernicious perpetuity calculated to aggrandize the family of the founder, is according to the Shariat the best of charity. *Ibid.*

—A provision for one's self, for one's children, is as good and charitable an act as a dedication for the support of the general body of the poor.

Wakf providing for both religious and charitable purpose, makes the wakf wholly for religious and charitable purposes.

A valid wakf-al-al-aulad as provided under the statutes, is a religious institution. *Ibid.*

—Wakf-alal-aulad entitled to the benefit of tax exemption as provided in the first part of clause (b) of s.4. of Agricultural Income Tax Act.

In view of the position of private trusts, and wakf-ai-al-aulads being such trusts, and it being a religious institution, such private trusts have not been excluded from the benefit of exemption as provided in the first part of clause (b) of section 4 of the Act. The wakf in question being a mixed one, that is, providing maintenance of wakifs family, children and descendants and also public charity and religious object, it comes under the first part of clause (b). *Ibid.*

—Wakf-alal-aulad under the Muslirñ Law is not to be treated as a partial trust—Legislature exempted income applied to wakf-alal-aulad from Agricultural Income Tax Act. *Ibid.*

—Muslim law does not make any difference between charitable purpose and religious purposes. *Ibid.*

—Difference between Income Tax Act and Agricultural Income Tax Act.

In the Income-Tax Act private trust has been expressly excluded from the benefit of exemption, whereas in the Bengal Agricultural Income-Tax Act this exclusion from exemption, not only omitted, but also wakf-alal-aulad, which is a private, trust, has been expressly exempted by specific mention of it. This makes the difference between the two statutes. It is not safe to interpret one statute on the authority of decided cases under another statute containing different provision and of different purpose and connotation.

Whether on the facts and circumstances of the case, under section 4(b) of the Act the word 'applied' means the actual amount of income applied to for such purposes by the Mutwalli or the amount of income set apart by the Waqif as per wakf deed for such purposes. *Ibid.*

War Risks Insurance Ordinance (25 of 1965)

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S. 12:—Roads and drains situate within a factory being used for running the factory are included in the company's assets for the purpose of insurance against war risk.

Amin Jute Mills Vs. Enquiry Officer (1978)30 DLR 341.

—10% depreciation allowed following usual traditional standard in the present case unobjectionable.

Since there was no prescribed rate for depreciation, the whole matter was at the discretion of the authorities and according to their discretion they allowed 10% depreciation. We do not think that any irregularity has been committed thereby. *Ibid.*

—Any steps taken in the bonafide belief such as exclusion of road and drains from the definition of building or factory unobjectionable.

Rules specifically provide for depreciation in the case of works under construction. *Ibid.*

Will

Presumption as regards execution of a will

Execution of a will by a testator ordinarily raises a presumption that the testator knew and approved of the contents of the will if nothing appears to the contrary; but where suspicious circumstances exist, strict proof to remove the doubt will be required.

Execution of the will in the present case whose probate has been sought to be obtained is surrounded with several suspicious circumstances such as:

1. The propounder of the will is the sole beneficiary under it.

2. He took leading part in the preparation of the will.

3. Scribe and attesting witnesses are persons. who are in the confidence of the propounder.

4. It has not been proved that the will was prepared according to the instructions of the testator or its contents were read out to him.

Held: In these circumstances the probate of the will cannot be granted.

Judhisthir Nath Vs. Haji Badsha Meah Sowdagar (1969)21 DLR 848.

Withdrawal of a case—as distinguished from composing an offence.

Withdrawal and composition are the distinct concepts. Withdrawal is the act of the complainant whereas the composition of an offence requires the cp-operation of both parties—Whether a petition is one for withdrawal or compromise, is to be judged from the facts of each case.

Md. Jonal Vs. Md. Rustan Ali (1984) 36 DLR (AD) 240.

Witness

In an appeal from the decision of a trial judge on a question of fact based on his opinion of the trustworthiness of witnesses whom he has seen, the court of appeal, in order to reverse the decision, must not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

Mukunda Baroi Vs. Nim Chand Sidhy. (1953) 5 DLR 206.

—Judgment of the trial Court has the special sanctity of its own. The trial court having the advantage to hear the evidence fresh from the mouths of the witnesses and to study their demeanor as they depose, is in a better position to appreciate the evidence than the appellate Court which has not that advantage.

Surabala Debi Vs. Rashik Chandra Baishya. (1954) 6 DLR 271.

—From the fact of filing hazira of witnesses it does not follow that the parties were ready and willing to examine their witnesses.

Syed Modaris Ali Vs. Syed Md. Ilias Ali (1972) 24 DLR 191.

—Hazira filed—Mere filing of hajira does not, necessarily, lead to the presumption that the witnesses were available for examination.

Abdul Latif Vs. Ashia Bibi, (1973) 25 DLR 108.

—A witness who changes his position and makes diverse statements at different stages should not be relied upon in a serious case involving murder charge.

Alkas Mia Vs. The State, (1973) 25 DLR 398.

—Witness on Commission—Many advantages of having a witness's testimony in open court not available when examined on commission.

One of the basic characteristics of judicial administration in the country is the holding of a trial in an open court and the rule requiring a witness who wants to

depose in the case to go upon the witness box and to give a sworn testimony which may be tested by cross-examination lays down a salutary procedure. That such a testimony is to be given in an open Court presupposes a kind of moral pressure which, under normal conditions of civilized society, is expected to ensure some amount of truthfulness on the part of a witness.

The Judge of the trial Court who is to decide the case should be in a position to make an assessment of the testimony given by a particular witness on the basis of the words deposed, mode of deposition as well as his entire demeanor in the witness box. The right of cross-examination of a witness of an opposite party in presence of the Judge is a valuable right. The provisions of the Code should be interpreted in a manner which is consistent with this basic principle of the judicial procedure.

Dacca WASA Vs. Roushan Ara Begum (1973) 25 DLR 461.

—Witness's evidence—assessment of.

Assessment of witness evidence by trial Court.

When the appellate Court can reverse trial Court's judgment.

As the trial judge has the advantage of seeing the witnesses and watching their demeanor, his finding, so far as it depends on the credibility of oral evidence, cannot be lightly interfered with.

Rakhal Chandra Vs. Benode Halder (1976) 28 DLR 421.

'Worker'

— A person does not cease to be a worker only because he is employed in a supervisory capacity. It depends on the nature of the job done to say whether he is a worker or not.

A person does not cease to be a 'worker' merely because he is employed in a supervisory capacity. To be able to say that he is not a worker it has to be established further that he exercises functions mainly of a managerial or administrative nature.

What is important in determining whether a person is a 'worker' or not is to see the main nature of the job done by him and not so much his designation.

The issue as to whether a person was a worker or not has to be resolved in each case with reference to the evidence on record.

Mujibur Rahman Sarkar Vs. Chairman, Labour Court, Khulna. (*1979) 31 DLR 301.*

—Doing over-time work gets over-time allowance—No over-time work no allowance—Employer alone competent to decide whether there is need or not for over-time work.

Chief Executive Vs. Chairman, Labour Court (1977) 29 DLR 83.

—Any allowance paid for work in the nature of over-time work, does not create a vested right in the worker to such allowance. *Ibid.*

—Does not include a person whose services have been terminated under section 19 of the Standing Orders Act, 1965.

Aminul Islam Vs. James Finlay & Co. Ltd. (1974) 26 DLR (SC) 34.

—A 'worker' or 'workman' who falls in the first category of workers as defined in clause (xxviii) of s. 2 of Industrial Relations Ordinance can maintain an application under section 34, but the first category does not include a dismissed worker.

G.M., Hotel Inter-Con. Vs. 2nd Labour Court (1976) 28 DLR 161.

—Workers or workmen—*Two* categories of workers or workmen—distinction defined.

The definition of workers or workmen in clause (xxviii) of section 2 of the Ordinance has classified them into two distinct categories. The two categories fall in two parts of the clause and are constructionally joined together by the use of the conjunction 'and' which is preceded and followed by comma. A worker or workman who falls in the first category means any person who is not an employer as defined in the Ordinance but is employed for hire or reward under any express or implied term of employment. An apprentice would also fall in this category.

G.M., hotel Inter-Con. Vs. 2nd LabourCourt (1976) 28 DLR 161.

—"Workman"

'Workman' as defined includes casual worker. The word 'and' is to be read in a conjunctive sense. Mason engaged for plastering wall of the employer's mill is a workman. Question whether employment casual or not is a question of fact.

Aftab Flour and Allied Industries Ltd. Vs. Mst. Nasim Akhtar. (1964) 16 DLR (WP) 199.

Works Programme Employees.

—Their relationship with the District Board is that of master and servant.

Administrator, Zilla Board Vs. Mukhlesur Rahman. (1984) 36 DLR 71.

Writ

Delay in seeking remedy under writ is a ground for refusing the prayer.

These related applications of the petitioners cannot be allowed on the ground that it will upset a condition prevailing for the last three years and create complications and chaos. If the petitioners thought that the notifications were made illegally, they should have promptly come before this Court seeking remedy.

M/s. Amin Jute Mills Ltd.Vs. The Chittagong Municipality (1968) 20 DLR 1041.

Writ jurisdiction—High Court's writ jurisdiction when question on facts and title involved.

There is a long line of decisions in favor of the view that the High Court should not enter into disputed questions of fact nor decide any question as to title which requires investigation into facts and taking of elaborate evidence.

A.H. Sikder Vs. Bangladesh (1979) 31 DLR (AD) 303.

—Emergency proclaimed on December 28, 1974 was revoked on November 27, 1979.

Decision of the Martial Law Courts in Martial Law period not challengeable except where there is want of jurisdiction or *coram non judice*.

Nasiruddin Vs. Government of the People's Republic of Bangladesh (1980) 32 DLR (AD) 216.

Writ petition

Writ petition found maintainable even though there was alternative remedy open. It was contended that there was alternative remedy against the impugned order by way of appeal which was not, however, availed of by the petitioner. But in view of the admitted position and expressive violation of statutory provision, the writ petition in this case is quite maintainable even if the alternative remedy was not availed of.

Kazi Ali Noor Vs. Secretary, Ministry of Agriculture. (1979) 31 DLR 428.

Writ of Certiorari

This being a Writ of certiorari, the superior Court is not competent to substitute its own finding reversing the finding of the Election Tribunal when the said finding is based on materials on record.

Imam Hossain Bepari Vs. Election Tribunal (1979) 31 DLR 381.

When it lies.

It is open to anyone to question, in a Writ of certiorari, an order passed in a quasi judicial proceeding. An application for a writ of certiorari can be maintained when it is shown that the tribunal has acted without or in excess of jurisdiction.

Application by the Municipal Committee complaining that the Controlling Authority did not properly appreciate the questions raised in respect of clauses 13 and 14 of the Model Tax Schedule was not maintainable under Article 98 of the Constitution of Pakistan—the decision arrived at by the Controlling Authority being either in excess or without jurisdiction.

American Life Insurance Vs. Dacca Paurashabha (1979) 31 DLR (AD) 277.

—Writ of certiorari lies against a statutory authority acting in quasi-judicial capacity—Such writ lays when Municipal Committee makes illegal or unauthorized assessment on land and building—Such a writ would lie when illegality of proceeding is apparent on the face of the record. *Ibid.*

Writ of mandamus—When will not be issued-There must be a demand of justice and refusal, before writ of mandamus will issue—Circumstances justifying a departure from the demand for justice and its denial.

Zamiruddin Ahmed Vs. Govt. of Bangladesh (1982) 34 DLR 34.

—Writ of mandamus in English Courts—when will not be to compel restoration of offices.

Cases in which the English Courts have invoked this extraordinary power for compelling restoration by writ of mandamus are all cases of offices which arc either corporate or elective offices or municipal positions. In England no court could possibly compel the restoration of office of any public servant in the service of the Crown, for all such servants of the Crown hold office during the pleasure of the Crown and no Court in England would presume to command the Crown. The authorities cited in Halsbury would also seem to indicate that even for other offices, the tenure of which is precarious or dependent on the will of another, a mandamus would not lie to compel restoration to such offices.

Munshi Abdul Jabbar Vs. Barisal Municipal Committee (1968) 20 DLR 1186.